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Crime - Chicago Anti - Gang Case [1]

Crime - Chicago anti-crime ordinance

6/17/98 3:15pm No. 97-1121

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CITY OF CHICAGO, PETITIONER

v.

JESUS MORALES, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a loitering ordinance making it a misdemeanor to disobey a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains one or more members of a criminal street gang, is impermissibly vague in violation of the Due Process Clause.

2. Whether petitioner's ordinance, which requires a group of loiterers containing one or more criminal street gang members to obey a police order to move on, violates substantive due process guarantees.

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INTEREST OF THE UNITED STATES

The federal government has identified the control of gang-related crime and violence as an important priority. For example, in 1995, the Department's Office of Community Oriented Policing Services funded an Anti-Gang Initiative, which awarded $11 million in grants to a number of cities (including Chicago) to pursue various locally developed anti-gang strategies. [citation]. The Federal Bureau of Investigation has developed a National Gang Strategy for working with state and local governments to identify gang problems and to employ the anti-gang resources of each level of government in a coordinated and effective manner. [citation].

Anti-loitering enforcement efforts have been part of the effort to coordinate law enforcement and community development activities under the federal Weed and Seed Program [statutory cite]. Congress has supported local efforts to address the problem of criminal street gangs by providing for enhanced penalties when certain federal crimes are committed in connection with such gangs. 18 U.S.C. 521.

The Chicago ordinance at issue in this case is one of several possible approaches to the problem of gang violence. The ordinance appears to have had a significant impact on gang violence in Chicago [OPD is getting enforcement dates and crime stats]. The federal government has a strong interest in supporting the efforts of local communities like Chicago to identify the law enforcement strategies best suited to each community's needs to combat gangs and gang-related violence.

STATEMENT

This case arises from respondents' challenges to their convictions for violating the City of Chicago's gang loitering ordinance. The Illinois Supreme Court held that the ordinance was unconstitutionally vague on its face and violated substantive due process.

1. In May 1992, the Chicago City Council enacted the gang

loitering ordinance at issue in this case after a series of hearings. In formal findings enacted as a preamble to the ordinance, the Council found that the "the continuing increase in criminal street gang activity * * * is largely responsible for" the City's increasing rate of murder and other violent and drug-related crimes. Pet. App. 60a. The Council also found that "[i]n many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." Ibid. The Council found that "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." Ibid. Gang members "maintain[] control over identifiable areas by continued loitering," but they "avoid arrest by committing no offense punishable under existing laws when they know the police are present." Ibid. As a result, "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." Ibid.

The ordinance itself provides in pertinent part:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons,

> he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance provides that "[i]t shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang." Id. at 61a. Each violation of the ordinance is punishable by a fine of up to $500, imprisonment for not more than six months, and performance of up to 120 hours of community service. Id. at 63a.

The ordinance defines each of its key terms. The ordinance provides that "'[l]oiter' means to remain in any one place with no apparent purpose." Pet. App. 61a. **The definition of "[c]riminal street gang" is modeled in part upon the definition in the 1994 federal statute enhancing penalties for certain federal crimes when they are committed in connection with a criminal street gang. 18 U.S.C. 521 (which in turn was modeled in part upon the definitions of organized criminal activity found in the federal RICO statute, 18 U.S.C. 1961). [citation for relation of statutes?]** A "[c]riminal street gang" is defined as "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more [of a series of enumerated crimes], and

whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Pet. App. 61a-62a. The enumerated crimes include murder, aggravated assault or battery, intimidation, robbery and armed robbery, arson, possession of explosives, bribery, and drug trafficking. Id. at 62a. "Criminal gang activity" is defined as the commission or attempted commission of any of those enumerated crimes, so long as they are committed by two or more persons or by an individual acting "at the direction of, or in association with, any criminal street gang" and with the specific intent to "further[] or assist in any criminal conduct by gang members." Id. at 62a. Finally, a "[p]attern of criminal gang activity" is defined as "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of [the ordinance]." Id. at 63a.

After the City Council adopted the ordinance, the Police Department issued a general order that provided further guidance regarding the terms of the ordinance. The order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a-69a. The general

order also provides that "[p]robable cause to establish membership in a criminal street gang must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific, documented and reliable information." Id. at 67a. Such information would include items such as an individual's admission of membership, the wearing of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant. Id. at 67a-68a. The general order provides that gang membership "may not be established solely because an individual is wearing clothing available for sale to the general public." Id. at 67a.

2. Respondents are 70 defendants who were charged with violating the gang loitering ordinance. Pet. App. 1a. Six of them were found guilty after separate bench trials and sentenced to jail terms from one to 27 days. Id. at 1a-2a. The trial courts dismissed each of the other cases, finding the ordinance unconstitutional on a variety of grounds. Id. at 1a. The state appellate court reversed the convictions and affirmed the dismissals. Id. at 1a-2a.

3. The Illinois Supreme Court held that the ordinance "violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." Pet.

App. 5a.

a. The court held that the ordinance is not "sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct." Pet. App. 7a. In the court's view, the term "loiter," even as defined by the ordinance to mean "to remain in any one place with no apparent purpose," is not "sufficiently definite so that ordinary persons can comprehend the prohibited conduct." Id. at 9a, 10a.

The court also held that the other elements of the offense do not cure the difficulty. The court construed the ordinance to include the additional element "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member," but concluded that this element too is vague because "[a]n individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." Pet. App. 11a-12a. The court added that "even adding a knowing association with a gang member to the act of loitering is still insufficient because the city cannot 'forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature.'" Id. at 12a.

The court also held that the element of failure to obey a police dispersal order "is * * * insufficient to cure the vagueness of the ordinance." Pet. App. 12a. In the court's view, that conclusion was dictated by Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-92 (1965), in which this Court stated that a statute prohibiting standing or loitering after having been requested by a police officer to move on would be unconstitutional.

b. The court also held that the ordinance "provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement." Pet. App. 15a. In particular, the court believed that the definition of the term "loiter" "provides absolute discretion to police officers to decide what activities constitute loitering." Ibid. The court also stated that the ordinance gives police "complete discretion to determine whether any members of a group are gang members." Ibid. The court acknowledged that the police general order "goes to great lengths to define criminal street gangs." Id. at 16a. But the court stated that the general order "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." Ibid.

c. With respect to the substantive due process challenge to the ordinance, the court referred to activities such as "loafing,

loitering, and nightwalking," and held that "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause." Pet. App. 17a. The court stated that the gang loitering ordinance "impedes upon" a number of "protected personal liberties," including "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Id. at 18a (citations omitted). Although the court recognized that these liberties "are not absolute," the court found "that the gang loitering ordinance unreasonably infringes upon personal liberty." Ibid. In the court's view, "[p]ersons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." Ibid.

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem of gang-related crime and violence has dramatically increased in recent years. Criminal street gangs increasingly attempt to control entire neighborhoods, intimidating the law-abiding citizens who live there and making it impossible for them to enjoy the amenities of public life. Experience has repeatedly demonstrated that, once such gangs take control of the

sidewalks and streets, the ordinary social mechanisms that tend to inhibit crime and other anti-social behavior cease working. Although attacking the homicides, drug crimes, and other serious crimes that gangs commit is one facet of the solution, a coordinated approach may also involve targeted community-based efforts to reacquire control of the streets from violent street gangs and restore public spaces to the use and enjoyment of the vast majority of residents. The Chicago gang loitering ordinance is a reasonable and narrowly tailored approach to achieving that goal in the particular circumstances faced by a city that has been one of the most hard-hit by gang violence.

The gang loitering ordinance is not unconstitutionally vague. Because the ordinance applies only to those who loiter for "no apparent purpose," it excludes from its scope those whose presence in a public place has as its purpose the expression of ideas protected by the First Amendment. Each of its key terms are carefully defined and have a meaning that would be comprehensible to persons of ordinary intelligence and common sense. The term "loiter" is defined to mean "to remain in any one place with no apparent purpose." Pet. App. 61a. That is not an unintelligible standard. Moreover, the ordinance imposes additional requirements for a conviction, including proof "that the arresting officer have

a reasonable belief that one person in a group of loiterers is a gang member," id. at 11a, and -- most significantly -- proof that the defendant has received and disobeyed a police order to disperse. Taken together, those requirements are sufficient to give fair notice to persons subject to the ordinance how they may conform their conduct to the law.

The ordinance also contains standards that satisfactorily confine police enforcement discretion. It does not permit police to sweep the streets of persons whom they find undesirable or annoying, or to remove minority or disfavored groups from the City. Instead, in light of the careful definition of each of its terms and the further requirements in the general police order, it permits the police to apply the ordinance only in areas where gang activity has threatened the local community and only against persons who, by virtue of their membership in criminal street gangs or their participation in groups containing such members, pose a particular threat to the community. Even as to such persons, the ordinance simply prohibits them from loitering in groups, and it authorizes arrests only of individuals who disobey police orders to disperse. In short, the ordinance provides far more notice and far more precise standards for enforcement than did the standardless ordinances this Court found unconstitutionally vague in

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and Coates v. City of Cincinnati, 402 U.S. 611 (1971), or the ordinance that this Court commented would be unconstitutional in Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).

The ordinance also does not violate substantive due process guarantees. It implicates two specific liberty interests -- the interest of gang members in standing in groups on the streets and sidewalks and in other public places in designated areas of the city, and the interest of non-gang members in standing in public places with gang members in those designated areas. Those interests are not commensurate with any of the fundamental liberty interests -- affecting the most intimate personal relations and the core of family life -- whose infringement may be justified only if narrowly tailored to serve a compelling state interest. Moreover, the City's interest in public safety, which forms a part of the justification for the ordinance, has frequently been found sufficient to justify substantially more serious intrusions on personal liberty, such as pretrial confinement on the basis of future dangerousness. United States v. Salerno, 481 U.S. 739, 748 (1987). And the specific prohibitions of the ordinance are narrowly tailored to advance the purposes of the ordinance in returning the City's public spaces to law-abiding citizens and

ultimately reducing the level of crime, fear, and violence in the specific areas of the City plagued with gang violence and intimidation.

ARGUMENT

I. THE GANG LOITERING ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE

A. The Ordinance Provides Reasonable Notice, In At Least A Wide Range Of Its Applications, Of What Conduct Is Prohibited

The vagueness doctrine is based on the proposition that, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Laws that fail to provide that kind of notice "may trap the innocent by not providing fair warning," ibid., and they therefore fail to satisfy due process standards.

The fact that a law has some imprecision, however, is not sufficient to render it unconstitutional. "Condemned to the use of words, we can never expect mathematical certainty from our language." Id. at 110. Moreover, the fact that the terms used in a statute have uncertain application to some conceivable conduct is insufficient to support a ruling, like that of the Illinois Supreme

Court in this case, that the statute is unconstitutional on its face. Instead, under well-settled standards, facial invalidation is permissible only if the challenged law is "impermissibly vague in all of its applications." Village of Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982). If the challenged law imposes reasonably intelligible standards in some factual settings, the law may constitutionally be applied in those settings; vagueness questions that arise in other settings should be resolved if and when cases involving as-applied claims in those settings arise. See, e.g., Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."); United States v. Powell, 423 U.S. 87, 92-93 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975).

1. Although the vagueness doctrine in general imposes only a modest restriction on the framing of criminal laws, "a greater degree of specificity," Smith v. Goguen, 415 U.S. 566, 573 (1974), is imposed where the challenged law regulates expressive conduct protected by the First Amendment. Such laws require special treatment to avoid a chilling effect on expression that may be close to the line of illegal conduct. See Village of Hoffman

Estates, 455 U.S. at 499; Grayned, 408 U.S. at 109.

The Chicago gang loitering ordinance does not limit expression protected by the First Amendment and is therefore not subject to this more stringent test. If a group of people standing in a public place are engaged in expressive conduct protected by the First Amendment, such as picketing, holding a demonstration, campaigning for a candidate, or gathering signatures on a petition, it can be expected that the group's message -- and its purpose of conveying that message -- would be apparent to outsiders. The ordinance's definition of "loitering," however, applies only to those who are standing in a public place "with no apparent purpose." Pet. App. 61a. Therefore, the ordinance by its terms has little or no application to those who are gathered for the purpose of engaging in protected expression.

Nor does the gang loitering ordinance limit the freedom of association. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court explained that two different sorts of freedom of association have received constitutional protection. One sort relates to "choices to enter into and maintain certain intimate human relationships," id. at 617, which generally involve "the creation and sustenance of a family" through "marriage, childbirth, the raising and education of children, and cohabitation with one's

relatives," id. at 619 (citations omitted). Those rights, which are protected as "fundamental element[s] of personal liberty" protected by the Due Process Clause, id. at 618, are not implicated by the gang loitering ordinance.

The other sort of conduct that comes within the freedom of association involves "a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 618.[1] The Illinois Supreme Court correctly stated that the government may not "forbid, on pain of criminal punishment, assembly with others merely to advocate activity." Pet. App. 12a (citing, inter alia, Brandenburg v. Ohio, 395 U.S. 444, 448-449 (1969)). But the gang loitering ordinance, as noted above, does not forbid such assembly, because those exercising this right of assembly have expressive activity ("advocacy") as their purpose. The ordinance, by contrast, prohibits only association "with no apparent purpose." The First

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[1] In the Illinois Supreme Court, respondents argued that the ordinance impinged on protected expression because those subject to the ordinance may be talking while they are loitering. See Defendants-Appellees Ill. Sup. Ct. Br. 13-14. The ordinance, however, does not prohibit or regulate talking. It merely requires those loitering with criminal street gang members to move on when ordered to do so.

Amendment does not include "a generalized right of 'social association' that includes chance encounters," City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989), and the ordinance therefore is not subject to the heightened review for vagueness applicable to laws that affect First Amendment rights of expression.

2.a. Under ordinary vagueness standards, the ordinance is constitutional. The ordinance defines the term "loiter" to mean "to remain in any one place with no apparent purpose." That is not an unintelligible standard. As the Illinois Supreme Court indicated, application of the ordinance does not turn on the actual purpose of the group of suspected gang loiterers, but whether that purpose is "apparent to an observing police officer." Pet. App. 10a. Moreover, the terms of the ordinance suggest that the "apparent purpose" inquiry is based on the apparent purpose for "remain[ing] in any one place." Thus, a group that is talking or smoking while remaining in one place would not ordinarily have an apparent purpose, since it would rarely be apparent to an observer that the group's purpose for remaining in that place -- rather than walking or moving elsewhere -- was to talk or smoke.[2] Finally, the

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[2] It is a factual question in each case whether a group has an apparent purpose for remaining in one place. For example, there may be circumstances in which a group's apparent purpose for remaining in one place is to smoke cigarettes -- for example, where

purpose simply to stand on a corner can not be an "apparent purpose" under the ordinance; if it were, the ordinance would prohibit nothing at all.

Applying those standards, it could be expected that individuals standing on a street corner or in front of a school or business and making no effort to enter a building or to engage in conduct conveying a message would be held to fall within the definition given in the ordinance. On the other hand, individuals attending a sporting event, waiting in line to enter a theater, or waiting at a bus stop until a bus arrives would plainly fall outside that definition.[3] The term "loiter" therefore has a "core" meaning that distinguishes proscribed from permitted conduct.

It is noteworthy that, insofar as it was litigated at all, the

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the group is smoking during business hours outside an office building in which smoking is known to be prohibited. Far from suggesting that the ordinance is vague, such examples demonstrate that the standard embodied in the ordinance may be intelligibly applied to a variety of factual circumstances.

[3] The Illinois Supreme Court suggested that the purpose of "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower" will "rarely be apparent to an observer." Pet. App. 12a. Although factual variations could affect each case, we doubt that the court was correct. Ordinarily, the conduct of people waiting to hail a taxi, for example, would make their purpose quite apparent to any observer, and the same may well be true of the other instances mentioned by that court.

"no apparent purpose" issue was resolved as a straightforward question of fact in each of the four cases in which respondents were found guilty after a full trial.[4] In one case, the respondent claimed that he was walking to meet his mother. Chicago v. Gutierrez, 4/12/94 Tr. 25-26. In another case, the respondent claimed that he was walking home from the hospital. Chicago v. Morales, 9/20/93 Tr. 17-18. In still another case, the respondent says he was walking out of a store to rejoin a friend who had waited outside with a group of others. Chicago v. Washington, 7/14/94 Tr. 28-29. In the fourth case, respondent Jose Renteria did not testify, and there was thus no claim that the respondent had an apparent purpose in standing on the street. In each of these cases, the trial court rejected the factual premises of the defenses; there was no confusion about what constituted an "apparent purpose." The experience in trying cases under the ordinance thus shows that the term "loitering" has a core meaning

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[4] The other two cases that resulted in convictions were tried on stipulated facts or testimony. In Garvin's case, the stipulated testimony included the fact that respondent Garvin was loitering. See Br. for Defendant-Appellant at 3, Chicago v. Garvin, No. 93-4356 (App. Ct. of Ill., First. Div.). In Jimenez's case, the stipulated facts simply included a recitation that respondnet Jimenez "knowingly remained at a known designated location for criminal street activity, after being informed by a police officer to disperse from this area." Br. for Defendant-Appellant at 3, Chicago v. Jimenez, No. 93-4351 (App. Ct. of Ill., First Div.).

that is sufficient to preclude a facial vagueness challenge. Possible unconstitutional applications, or questions about the interpretation of the ordinance's standard at the margins, should be resolved on an as-applied basis.

A comparison with the ordinance this Court held unconstitutionally vague in Coates v. City of Cincinnati, 402 U.S. 611 (1971), is instructive. The operative language in the ordinance in Coates prohibited three or more people from assembling on a sidewalk and "conduct[ing] themselves in a manner annoying to persons passing by." Id. at 611. Noting that "[c]onduct that annoys some people does not annoy others," id. at 614, the Court explained that therefore rather than "requir[ing] a person to conform his conduct to an imprecise but comprehensible normative standard, * * * no standard of conduct is specified at all." Ibid. Unlike the ordinance in Coates, the term "loiter" in the Chicago gang loitering ordinance does specify a standard of conduct. At least in combination with the other requirements of the ordinance, it is not unconstitutionally vague.

b. The Illinois Supreme Court acknowledged that "persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter.'" Pet. App. 9a. But the court stated that "such term by itself is inadequate to inform a citizen of its criminal

implications." Ibid. In the court's view, "[t]he infirmity" of the use of the term "is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" Ibid. (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972)). Even as defined by the ordinance, the court held, "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." Id. at 10a.

The Illinois Supreme Court's reasoning is unsound. It is not the task of a court, in adjudicating a vagueness challenge to a statute, to determine whether the statute criminalizes only "conduct calculated to cause harm." It is up to the legislature to determine what conduct is likely to cause harm in a given community, and the City Council's determination that gang loitering is likely to cause harm in Chicago was fully supported by the record and should be conclusive. Nor does the constitutionality of an ordinance depend on whether it "makes criminal activities which by modern standards are normally innocent." Social problems -- and tolerance of disorder -- vary among different communities and even in the same community at different times. It is a part of the substantive due process inquiry, see pp. __-__, infra, to determine

whether a particular prohibition falls within a community's wide discretion to subject particular conduct to the sanctions of the criminal law. Judicial second-guessing of a community's determinations regarding conduct that should be criminalized is not, however, a part of the vagueness inquiry. If conduct is adequately defined in a criminal statute to give fair notice and avoid standardless discretion, the fact that it is "by modern standards * * * normally innocent" is "not a defect of clarity." Village of Hoffman Estates, 455 U.S. at 497 n.9.

3. Conviction under the ordinance requires not only proof of loitering, but also proof of other requirements as well. The addition of those elements is sufficient to satisfy fair notice requirements, regardless of any indeterminacy that may inhere in the term "loiter," as defined by the ordinance.

a. As the Illinois Supreme Court recognized, proof of a violation of the ordinance requires proof "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member." Pet. App. 11a. In at least a great many cases, persons subject to the statute can be expected to know whether they are loitering with gang members and whether the police officer issuing the order has a reasonable belief that gang members are present. Indeed, because it is important to the gang to assume

visible control over an area, members of gangs often wear distinctive clothing, colors, and insignia; they wear those items in distinctive ways; they employ distinctive hand signals; and they frequently freely admit to their membership in the gang.[5] The intimidating effect of gang loitering -- one of the primary evils against which the ordinance was directed -- results precisely because gang members and affiliates loitering in public places make their status as gang members clear to onlookers. In addition, the gang's recruiting function -- also a target of the ordinance -- depends on easy recognition of the gang affiliation of a group of

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[5] For example, in the case of at least three of the four respondents who were found guilty after a full trial of violating the ordinance, the police officers testified that respondents and/or others in the group with which they were loitering admitted gang membership. See Chicago v. Gutierrez, 4/12/94 Tr. 11-12; Chicago v. Morales, 9/20/93 Tr. 7; Chicago v. Washington, 7/14/94 Tr. 10, see also id. at 4. In the fourth case, although the police officer did not testify regarding whether the defendant had admitted his gang membership, the officer did state that gang members "admit they are gang members and they are very proud of it." Chicago v. Renteria, 9/29/94 Tr. 13; see also id. at 11 (gang members "readily admit" membership). See note __, supra (two other respondents found guilty after trials on stipulated evidence). In addition, the use by gang members of distinctive clothing, colors, and hand signals is well-attested. As a recent monograph published by a Department of Justice component noted in its definition of "street gang," "[t]he group frequently identifies with or claims control over specific territory (turf) in the community, wears distinctive dress and colors, and communicates through graffiti and hand signs." Bureau of Justice Assistance, Urban Street Gang Enforcement 30 (1997).

loiterers. See id. at 2a (City Council heard testimony that "gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents."). Accordingly, individuals may in most cases readily determine whether they are engaging in gang loitering subject to the ordinance.[6]

b. The ordinance also requires proof that the defendant failed to obey a police order to disperse. Even if fair notice were a close question based on the other requirements of the statute, this element would be sufficient to cure any problem. A person of ordinary intelligence and common sense who receives a police order to disperse under the ordinance should be in no doubt about "what is prohibited" and should easily be able to "act

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[6] There may be cases in which a defendant can show that he had no way to determine whether or not a police officer could have had a reasonable belief that a gang member was present in a group of loiterers. If such a case arises, the question presented would be whether the other requirements of the statute -- especially the requirement of an order to move on -- were sufficient to have given the defendant "a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Regardless of the answer to that question, the existence of some such cases could not be sufficient to render the statute unconstitutionally vague on its face -- i.e., incapable of application even where the gang affiliation of members of a group of loiterers is in no way unclear. Cf. Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

accordingly." Grayned, 408 U.S. at 108. Criminal statutes ordinarily are enforced with far less specific notice than occurs under the Chicago gang loitering ordinance. A person who fails to obey a police order to disperse under the ordinance cannot complain of lack of fair notice.

This Court's decision in Colten v. Kentucky, 407 U.S. 104 (1972), makes clear that there is fair notice under the ordinance. In Colten, the statute under challenge prohibited "[c]ongregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse," when done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." See id. at 108. This Court rejected the defendant's argument that the statute did not provide fair notice, explaining that a person who satisfies the other elements of the statute "should understand that he could be convicted under [the statute] if he fails to obey an order to move on." Id. at 110. The ordinance in this case requires the same police dispersal order as in Colten. Accordingly, as in Colten, "citizens who desire to obey the statute will have no difficulty in understanding it." Ibid.

The Illinois Supreme Court ignored Colten in its analysis of fair notice. Instead, that court relied on Shuttlesworth v. City

of Birmingham, 382 U.S. 87, 90 (1965), in which this Court noted that an ordinance that, without more, made it "unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on" would be unconstitutionally vague. The Illinois Supreme Court stated that "[t]he proscriptions of the gang loitering ordinance are essentially the same as the Shuttlesworth ordinance" and relied upon Shuttlesworth for the principle that "if the underlying statute is itself impermissibly vague, * * * then a conviction based upon failure to obey the order of a police officer pursuant to that statute cannot stand." Pet. App. 13a.

The Chicago gang loitering ordinance is not "essentially the same" as the ordinance in Shuttlesworth. The ordinance in Shuttlesworth, "[l]iterally read, * * * says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer." 382 U.S. at 90. That, together with the ordinance's "ever-present potential for arbitrarily suppressing First Amendment liberties," id. at 91, was the basis for this Court's ruling. In contrast, the Chicago gang loitering ordinance, especially together with the accompanying police order, has extensive definitions of its key terms that very substantially limit police discretion, see pp. __-__, infra, and it does not

substantially affect expressive activities protected by the First Amendment.

Shuttlesworth does not, as the Illinois Supreme Court stated, stand for the principle that a police order requirement could not cure any vagueness that could be seen to inhere in any of the other requirements of the ordinance. Even where a statute regulates expression and therefore is subject to particularly stringent vagueness requirements, the statute as a whole may provide fair notice despite the fact that some of its elements, taken alone, fail to do so. Reno v. ACLU, 117 S. Ct. 2329, 2345 (1997) ("Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague."). Similarly here, the ordinance as a whole -- including in particular the police order requirement -- provides fair notice of the conduct that it prohibits, so that individuals may conform their conduct to law.

B. The Ordinance Does Not Encourage Arbitrary And Discriminatory Enforcement

The "more important aspect of the vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983). The ordinance satisfies that requirement.

1. As noted above, the key terms in the statute are carefully defined. The ordinance provides that individuals may be asked to move on only based on a reasonable belief that they are "loitering" -- a defined term whose meaning has already been discussed -- with one or more persons, at least one of whom is reasonably believed to be a gang member. A "gang" is defined as a group of three or more persons that has "as one of its substantial activities" the commission of enumerated serious criminal offenses, and whose members commit, attempt to commit, or solicit the commission of those offenses, provided that they are committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Pet. App. 61a-62a. That definition substantially limits police discretion. In precise terms, it aims the statute's prohibitions at those who choose to affiliate with criminal organizations. Even as to those persons, it may not be used simply to arrest all members of such organizations, but simply requires them to move on when ordered to and continue their activities -- whatever they may be -- without loitering. Cf. Lanzetta v. New Jersey, 306 U.S. 451 (1939) (holding unconstitutionally vague statute making it a crime to be a gang member who has no occupation and has been convicted of a prior offense).

The Chicago ordinance does not suffer from the vices of the

ordinance before this Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 156-157 n.1 (1972). That ordinance included a list of crimes -- including nightwalking, wandering about from place to place without any lawful purpose or object, loafing, living upon the earnings of one's wife -- that was "so all-inclusive and generalized" that "those convicted may be punished for no more than vindicating affronts to police authority." Id. at 166-167. The fact that in Papachristou there were "no standards governing the exercise of the discretion granted by the ordinance," id. at 170, permitted police in effect to criminalize the failure by disfavored groups "to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." Ibid. By contrast, no one is guilty of a crime under the Chicago ordinance merely because of lifestyle, and even those subject to the act are not made criminals, but are merely required to keep moving when requested to do so by police under the ordinance.

2. This Court has frequently considered administrative enforcement guidelines in evaluating vagueness claims. For example, in Village of Hoffman Estates, the Court relied in part on guidelines "prepared by the Village Attorney," 455 U.S. at 492-493 & n.3, in holding that the terms in a local drug paraphernalia

ordinance were not unconstitutionally vague. Id. at 500-501 & n.18; see also id. at 504 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").[7]

The police order in this case further limits the discretion granted the police. First, the general order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a-69a. The order therefore limits the enforcement of the ordinance to specific areas of the city in which gang loitering poses a present threat and in which reasonably thorough and nondiscriminatory enforcement is a practical, achievable goal. That in itself vitiates the possibility that the ordinance could be used as a general license

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[7] See also Kolender v. Lawson, 461 U.S. 352, 355 (1983) (court must "consider any limiting construction that a state court or enforcement agency has proffered") (emphasis added); Parker v. Levy, 417 U.S. 733, 754 (1974) ("[E]ven though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative * * * sources, further content may be supplied even in these areas by less formalized custom and usage."); Ehlert v. United States, 402 U.S. 99, 105, 107 (1971) (relying on "reasonable, consistently applied administrative interpretation" and "letter included in the briefs" from administrative authorities regarding "present practice").

to trap or harass disfavored individuals throughout the city.

Second, the general order includes detailed instructions concerning how police officers may establish that an individual is a gang member. The order provides that such membership "must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific documented and reliable information." Pet. App. 67a. The order goes on to detail the types of information that would be sufficient in this regard (e.g., an individual's admission of membership, the wearing of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant, id. at 67a-68a) as well as some types of information that would be insufficient (e.g., the wearing of "clothing available for sale to the general public," id. at 67a).

Taken together, the definition of the key terms in the ordinance itself and the further specifications in the police general order limit the enforcement discretion of police officers well within reasonable standards. The ordinance therefore does not suffer from the defect of the statute held unconstitutional in Kolender v. Lawson, which required individuals to provide "credible and reliable" identification to police officers on request, and which "contain[ed] no standard for determining what a suspect has

to do in order to satisfy [that] requirement." 461 U.S. at 358. The ordinance also does not remotely resemble the wide-ranging ordinances that delegated virtually standardless discretion to the police in Papachristou, Coates, or Shuttlesworth, to stop and/or arrest anyone they wished.

II. THE CHICAGO GANG LOITERING ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS GUARANTEES

This Court has held that the Due Process Clause has a substantive component, which "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." County of Sacramento v. Lewis, No. 96-1337 (May 26, 1998), slip op. 5. The "core of the concept" of substantive due process is "protection against arbitrary action," and against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." Id. at 10, 11. It "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) (citations and internal quotation marks omitted).

A. The Ordinance Implicates Liberty Interests

1. This Court has noted that substantive due process analysis requires "a careful description of the asserted fundamental liberty interest." Glucksberg, 117 S. Ct. at 2268 (internal quotation marks omitted); see Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("The doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever we are asked to break new ground in this field.").

The Illinois Supreme Court described a number of liberty interests it believed were at stake in this case. It stated that activities such as "loafing, loitering, and nightwalking" are "amenities of American life," and "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause." Pet. App. 17a (citing Papachristou, 405 U.S. at 164). The court also referred to "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Pet. App. 18a (citations omitted). In the court's view, "[t]he gang loitering ordinance impedes upon [sic] all of these personal liberty interests." Ibid.

We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in

standing on sidewalks and in other public places, and in traveling, moving, and associating with others. But characterization of the interests at that level of generality is of limited utility in this case, because in ordinary application the gang loitering ordinance does not deprive individuals of some of those interests (e.g., the interests in traveling and moving) at all, and it deprives individuals of other interests (e.g., standing in public places and associating with others) only to a limited extent and only in some circumstances. Although the justifications for the gang loitering ordinance may not be sufficient to justify depriving all citizens of Chicago of these interests in their entirety, the justifications may be sufficient to justify the ordinance's much more limited effect. Accordingly, a more tailored description of the liberty interest at stake in this case is required.

2. The Chicago gang loitering ordinance implicates two distinct liberty interests. First, it implicates the interest of gang members in standing in public places with others in areas of the City designated pursuant to the police general order; gang members who do so "with no apparent purpose" may expect to receive police orders to disperse. See Pet. App. 61a (ordinance provides that police officer observing persons engaged in gang loitering "shall order all such persons to disperse and remove themselves

from the area") (emphasis added). Second, it implicates the interest of non-gang members in standing in public places with one or more gang members in designated areas of the City; non-gang members who do so "with no apparent purpose" are also subject to police orders to disperse.

The ordinance has a somewhat different effect on each of those liberty interests. With respect to gang members, the ordinance deprives them of a large part of their interest in standing in public places in the company of others. They may, of course, freely walk with whomever they wish.[8] They may stand wherever they wish in areas of the city not designated by the police general order. Even in designated areas, they may stand where they wish, so long as they do so alone. And they may stand in public places with individuals of their choice in designated areas, so long as their purpose in doing so is not merely to loiter -- i.e., they may do so to attend a sporting event or concert, to exercise their First Amendment rights of expression, to wait for a taxi or bus,

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[8] The Illinois Supreme Court erred when it stated that "[p]ersons suspected of being in criminal street gangs are deprived [by the ordinance] of the personal liberty of being able to freely walk the streets and associate with friends." Pet. App. 18a. The ordinance does not prohibit anyone from "freely walk[ing] the streets." Its effect is limited to prohibiting standing in one place with no apparent purpose with gang members.

etc. But their ability merely to stand on the streets and sidewalks and in other public places in designated portions of the city and socialize with others is severely constricted by the ordinance.

With respect to non-gang members, the ordinance imposes a much more limited restriction. Non-gang members may continue to stand with whomever they want, wherever they want, with one exception: they may not loiter with gang members in designated areas of the city. Of course, although that is a more limited restriction, it potentially affects a far larger number of people.

B. The Interests Supporting The Gang Loitering Ordinance Are Sufficient To Justify Its Limited Intrusion On The Identified Liberty Interests

The recognition of an interest as one encompassed within the meaning of the term "liberty" is only the first step in deciding whether a law violates substantive due process. It then must be determined, based on an objective analysis of "[o]ur Nation's history, legal traditions, and practices," Washington v. Glucksberg, 117 S. Ct. at 2268, whether the government's justifications for overriding the liberty interests at stake are sufficient. The strength of the justification that is required depends upon the nature and character of the liberty interest at stake. See Cruzan v. Director, Missouri Dep't of Health, 497 U.S.

261, 279 (1990) (liberty interest in refusing medical treatment must be balanced against the relevant state interests); Williamson v. Lee Optical of Ok., Inc., 348 U.S. 483, 491 (1955) (state restriction affecting a person's ability to engage in a business must merely be rationally related to a legitimate government purpose); Reno v. Flores, 507 U.S. 292, 301-302 (1993) (infringement of certain fundamental liberty interests must be narrowly tailored to serve a compelling interest).

1. This Court has recognized that infringement of certain fundamental interests that go to the heart of personal privacy and autonomy may be justified only by a showing that the infringement is "narrowly tailored to serve a compelling state interest." Flores, 507 U.S. at 302; Glucksberg, 117 S. Ct. at 2267. Such liberty interests "include[] the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Glucksberg, 117 S. Ct. at 2267 (citations omitted). The liberty interests at stake in this case do not fall within that category, and the Illinois Supreme Court did not suggest that they did.

2. That is not to denigrate the importance of the liberty interests that are at stake in this case. This Court recognized in

Papachristou that the ability to stand on a sidewalk and meet one's friends and neighbors, or to sit on a sidewalk bench with others and watch the passing show, are "unwritten amenities [that] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity." 405 U.S. at 164. In most circumstances, the American people treasure such innocent "amenities," and the government has little occasion or basis to interfere with them.

This Court, however, has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." United States v. Salerno, 481 U.S. 739, 748 (1987). In Salerno, that interest was found sufficient to justify a complete deprivation of liberty -- pretrial detention on the basis of future dangerousness. The record in this case demonstrates that the Chicago City Council had a sufficient basis to justify the far less severe restriction on liberty in the gang loitering ordinance.

a. The Illinois Supreme Court stated that the ordinance was "arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime." Pet. App. 18a. That is incorrect. The ordinance itself defines a crime based on the present threat to public order caused by gang loitering. As the

Preamble to the ordinance recites, the City of Chicago was "experiencing an increasing murder rate as well as an increase in violent and drug related crimes." Pet. App. 60a. The City Council, after holding extensive hearings, determined that "the continuing increase in criminal street gang activity * * * is largely responsible for this unacceptable situation." Ibid. A key part of the problem was that "criminal street gangs establish control over identifiable areas * * * by loitering in those areas" and "intimidat[ing] many law abiding citizens." Ibid. Such loitering "creates a justifiable fear for the safety of persons and property in the area." Ibid. The City Council concluded that "[a]ggresive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear." Id. at 61a.

Those findings were not only supported by the record before the City Council, but are also consistent with data gathered from many other communities. By the early 1990's, 95 % of the nation's largest cities and 88 % of smaller cities in the nation reported gang problems.[9] Most prevalent in areas in which the population is

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[9] Office of Investigative Agency Policies, U.S. Dep't of Justice, Reducing Violent Crime in America: A Five-Year Strategy 4 (1996).

economically disadvantaged, criminal street gangs have attracted a growing number of young people to a life of violence and crime. A component of the Department of Justice has identified more than 23,000 youth gangs in the nation, with more than 650,000 members.[10] In 1994, criminal street gangs accounted for more than 1,000 gang-related homicides in Chicago and Los Angeles alone.[11] Gang intimidation of witnesses makes prosecution of those homicides -- as well as prosecution of the numerous other serious crimes committed by street gang members -- particularly difficult.

b. Faced with that threat to public safety, the City adopted a reasonable and carefully tailored approach. Once criminal street gangs obtained control of the streets in an area, the fear and intimidation they spawned deprived law-abiding citizens of the

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[10] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, 1995 Nat'l Youth Gang Survey: Program Summary 12, 15 (1997).

[11] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, OJJDP Fact Sheet #72 (1997). Chicago has been particularly hard-hit by gang violence. In 1995, Chicago's total of 33,000 gang members was second only to Los Angeles among American cities. 1995 Nat'l Youth Gang Survey 16 (1997). In 1994, there were 240 gang-motivated homicides in Chicago, an all-time high, a five-fold increase from the number in 1987. Ill. Criminal Justice Information Auth., Research Bulletin 4 (Sept. 1996). Between 1987 and 1994, 138 of the 956 gang-related homicide victims were not gang members, including 12 victims age nine or younger. Id. at 10, 13. Of the 956 homicides, 120 were drive-by shootings. Id. at 18.

ability to meet with friends and neighbors in public places and otherwise enjoy this "amenity" of American life. The City's response was to take action so that the "amenity" discussed in Papachristou could be restored to the vast majority of the citizens in the troubled areas. That end, if reached, would lead to the reestablishment of social controls in those areas and a concomitant reduction in fear, gangs, and violent crime. See Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 578-585 (1997) (citing sources).[12]

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[12] It could hardly be argued that the approach adopted by the ordinance is inconsistent with the traditional approach to such problems. In Papachristou itself, the Court noted that vagrancy and loitering statutes had a long history. See 405 U.S. at 161-162. See also Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 595 (1997) (citing authorities for proposition that, prior to Papachristou, "[m]ost states had loitering, drunk and disorderly, and vagrancy statutes, in addition to laws prohibiting breaches of the peace, disorderly conduct, and specific forms of public disorder.") (internal quotation marks omitted). The fact that some of those statutes were unconstitutionally vague under modern standards does not alter the fact that the history and traditions of our people would be inconsistent with the recognition of the right claimed by respondents to loiter at will, regardless of the threat to lawful community life thereby created. See Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) ("Our Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.") (internal quotation marks and citation omitted).

The ordinance's substantial intrusion on the liberty interests of gang members is justified. Under the ordinance, a "[c]riminal street gang" is a group that has "as one of its substantial activities the commission" of one of a series of enumerated serious crimes, such as murder, aggravated battery, intimidation, armed robbery, arson, and drug offenses. Pet. App. 61a-62a. The members of such a gang must "individually or collectively engage in or have engaged in a pattern of criminal gang activity," requiring the commission of at least two offenses. Pet. App. 62a-63a. Criminal organizations of this sort pose a particular threat to the communities in which they operate. The City reasonably believed that denying control of the streets and public areas to gang members was an essential element of attacking that threat. The ordinance intrudes on the liberty interests of those who choose to join criminal street gangs to precisely the extent necessary to address the control of the streets by such gangs. In addition, gang members may remove this disability by discontinuing their membership in the gang.

The ordinance's somewhat lesser intrusion on the liberty interests of those who are not gang members is also justified. Their conduct is implicated only when they loiter with gang members. The City reasonably believed that, once a group of people

loitering in a particular area becomes identified with a particular gang, the group itself poses the threats of intimidation of law-abiding citizens, coercive recruiting practices, inter-gang violence, and the like. Even if it were practical to identify all of the actual gang members in the group and then to require only the gang members to disperse, the City reasonably concluded that that would not solve the problem. In the eyes of onlookers -- including both law-abiding citizens and rival gangs -- the group's identity would persist and the threats to public safety posed by the group would persist. Accordingly, the City reasonably concluded that, where gang members loiter in a group, the group itself had to be dispersed to eliminate the threat. The ordinance is tailored to intrude upon the interests of non-gang members only to the extent necessary to accomplish that goal.[13]

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[13] In addition, the City Council was certainly aware of the threat posed by drive-by shootings and other gang-related violence. See Pet. App. 2a (City Council testimony "revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism."). As a result of that threat, anyone standing with a gang member on a street corner -- especially someone who is unaware that the group contains gang members -- is a potential casualty of stray fire as a result of inter-gang violence. The City has a strong interest in protecting non-gang members from such violence, and the ordinance's requirements that even non-gang members disperse when they are in a group containing gang members assists in achieving that goal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1998

U.S. Department of Justice

Office of Policy Development

Crime - chicago anti-gang ordinance

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Room 4234
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May 21, 1998

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: City of Chicago v. Jesus Morales, et al., No. 97-1121, petition for a writ of certiorari granted, April 20, 1998

You have asked the Office of Policy Development to review the interests of the Department of Justice and other federal agencies in this case. This memorandum describes the anti-gang loitering ordinance being reviewed by the Supreme Court, provides four bases for the federal government's involvement in the case, and recommends participation as amicus curiae in support of the City of Chicago, provided that you conclude that the ordinance withstands constitutional scrutiny.

STATEMENT

In 1992, the Chicago City Council enacted an anti-gang loitering ordinance in an effort to address the growing problem of criminal street gang activity. The ordinance proscribes loitering by members of criminal street gangs. Under the ordinance, Chicago police may order two or more persons loitering in a public place to disperse if the officer reasonably believes that one of them is a member of a criminal street gang. Failure to comply with the order is punishable by up to six months imprisonment, a $500 fine or 120 hours of community service.

In enacting the ordinance, the Chicago City Council made a number of specific findings, based on testimony and other information, describing how loitering is an essential part of gang activity. In particular, the City Council found the following: First, street gangs loiter as part of a strategy to recruit members, claim territory and antagonize and drive off rival gangs. Second, existing laws are inadequate to control gang loitering. Gang members evade arrest because they do not commit punishable offenses in the presence of police, and residents in the community are afraid to report gang crimes for fear of reprisals. Third, gangs are menacing and intimidating to ordinary citizens and the community as a whole; they are destructive regardless of whether their members are committing crimes. People are afraid to be on the street if gang members are present in the community, or if a gang controls the area.

Citing statistics, Chicago city officials report that the ordinance proved to be a strong and effective law enforcement tool to attack gang violence. In a two-year period from 1994 through

1995, the Chicago Police made 31,000 dispersals and 37,000 arrests using the ordinance.[1] In 1995, gang-related homicides dropped 25 percent, and there was a 13 percent decline in the number of homicides involving victims under the age of 21.[2] In contrast, the rate of gang-related homicides rose 11 percent in 1996, after the ordinance was no longer in effect. More generally, where Chicago police removed gang members from the streets, residents reportedly were able to emerge from their homes and function fully in their communities.

The ordinance was in effect from 1992 until December of 1995, when it was declared unconstitutional by the Illinois Supreme Court. The Supreme Court granted the City of Chicago's petition for a writ of certiorari.

DISCUSSION

Over the past two decades, criminal street gangs have become a serious law enforcement problem for federal and state governments alike. By the early 1990's, 95 percent of the nation's largest cities and 88 percent of smaller cities in the nation reported gang problems.[3] Most prevalent in areas in which the population is economically disadvantaged, criminal street gangs have attracted a growing number of young people to a life of violence and crime. The Department of Justice has identified over 23,000 youth gangs in the nation, with over 650,000 members.[4] In 1994, criminal street gangs accounted for over 1,000 gang-related homicides in Chicago and Los Angeles alone.[5] President Clinton has called the problem of gang violence "among the most profound we as a people have ever faced."[6]

To respond to the problem of gangs, the federal government has put into place a comprehensive gang-fighting strategy. The Chicago anti-loitering ordinance advanced three key elements of this strategy, each of which is considered in greater detail below. First, it furthered the federal government's cooperation with state and local law enforcement and contributed to the efficient use of federal resources. Second, the ordinance provided a tool for community police officers, advancing the federal community policing initiative. Third, the ordinance demonstrated

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[1] "Mayor, Superintendent Endorse Assault Weapons Ban, Anti-Gang ordinance," City of Chicago Community Policing Press Release.

[2] Id.

[3] U.S. Department of Justice, Reducing Violent Crime in America: A Five-Year Strategy, at 4 (May 1996).

[4] U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention 1995 National Youth Gang Survey (August 1997).

[5] U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #72 (Dec. 1997).

[6] Proclamation by the President, "National Gang Violence Prevention Week, 1994," September 10, 1994.

the importance of using innovative laws in community efforts to fight crime and restore order, a strategy advanced by the federal government. The federal government must, however, assure that aggressive efforts to fight crime do not infringe the rights of individuals or encourage unlawful police practices. To this end, it is important for the federal government to be involved in this case, which may well establish the appropriate constitutional bounds for anti-crime public order measures.

1. The Chicago Ordinance Supported Cooperative Federal, State, and Local Efforts to Eradicate Criminal Street Gangs and Contributed to the Efficient Use of Federal Resources

Through the federal government's Anti-Violent Crime Initiative, launched in 1994, federal law enforcement agencies, under the leadership of United States Attorneys' Offices, have combined forces with state and local law enforcement agencies to tackle tough crime problems.[7] These federal agencies include the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the U.S. Marshals Service, the Immigration and Naturalization Service (INS), the Bureau of Alcohol, Tobacco and Firearms (ATF), and other federal law enforcement agencies. The Attorney General directed participating jurisdictions specifically to consider the problem of street gangs through this multi-jurisdictional team. Federal, state, and local officials work together to direct criminal defendants to the state or federal criminal justice system for prosecution, depending on which system has the most effective laws for the crime in question, available resources, and whether state or federal prosecution would best serve the region's crime-fighting strategy.

The Chicago ordinance advanced the federal government's work with state and local law enforcement agencies and supported federal efforts to dismantle criminal street gangs in important ways.

First, according to the U.S. Attorney's Office in Chicago, the City's anti-loitering ordinance proved to be a useful tool in the federal and local anti-gang enforcement efforts in Chicago. In 1995, the U.S. Attorney in Chicago succeeded in removing entire cells of the Gangster Disciples gang from geographic areas of the city in which they had operated and prosecuting the leaders of this notorious gang.[8] The U.S. Attorney's Office worked closely with community police stationed in the affected areas, encouraging them to increase their presence and visibility when necessary to support federal enforcement efforts. Community police backed up the federal prosecution by keeping new gangs from taking hold in areas cleared of Gangster Disciples. The quality of life in these areas improved considerably as a result of the federal

[7] The federal government's various law enforcement activities and grant programs that target criminal street gang activity are described in the attached Appendix.

[8] Interview with Chief of the Criminal Section of the U.S. Attorney's office for the Northern District of Illinois, May 15, 1998.

prosecution and subsequent enforcement of the ordinance. Without the coordination that occurred between the federal prosecutors and the community police, the successful federal prosecution might have been ineffective, and a new gang could have taken control of areas vacated by the Gangster Disciples.

Ongoing cooperative federal law enforcement efforts would also benefit from use of the Chicago anti-gang loitering ordinance, were it still in effect. For example, the Department of Justice and the Department of Housing and Urban Development teamed with city officials in an operation to clean up the Wentworth Gardens housing project and surrounding areas, a community imperiled by illegal street gangs. Had it been available, the ordinance might have proven extremely useful in this effort to eradicate gangs from Chicago public housing projects.

Second, the effective enforcement of the anti-gang loitering ordinance by local law enforcement in Chicago has helped to conserve federal resources. Through this local enforcement of the ordinance, volatile situations that otherwise could have escalated to violence, and necessitated a federal response, were instead diffused by removing gang members from the streets. Federal government resources that would ordinarily be used to respond to the escalation could instead be diverted to other crime-fighting efforts. Federal funds were used more efficiently as a result.

2. The Ordinance Supported the Work of Federally-Funded Community Police Officers and Advanced the Federal Government's Community Policing Strategy

The federal government has made a major commitment to funding community police officers and providing other support for law enforcement to fight street gangs and local criminal activity. As part of a national community policing strategy, the federal government is funding up to 100,000 new community police officers through the COPS program, enacted as part of the 1994 Crime Act.[9] The goal of the community policing program is to have each community use its officers to address local crime problems in the best way that the community sees fit. These police officers establish order in neighborhoods, and enforce public safety codes and other laws to prevent serious crimes from occurring.

The COPS program has funded 571 new community police officers in Chicago to date. In addition, Chicago was one of 15 communities nationwide to participate in the COPS Anti-Gang Initiative and to develop innovative approaches to solve gang problems. Chicago established its own citywide community policing program in 1993, and used community police officers to combat the activity of criminal street gangs in part through the enforcement of the anti-gang loitering ordinance. The Chicago community police officers came to rely on this

[9] The Department of Justice also administers a number of specific grant programs to help communities combat gang violence and to develop new approaches to the problem of gangs.

ordinance as a critical tool to fight gangs, and it served as a central element in the Chicago community policing program.

3. The Federal Government Supports the Use of Public Order Measures to Fight Crime

The Clinton Administration has supported local communities in their decisions to adopt and enforce public order and quality of life laws as part of a strategy to reduce crime and violence. Today, many communities around the country are enforcing curfews, requiring school uniforms, enforcing anti-truancy laws, and adopting other public safety measures, such as anti-gang loitering ordinances, to disrupt patterns of criminal behavior that have taken hold on community streets. Many communities receive federal funding or other support to advance these measures. For example, in the Los Angeles area, Weed and Seed sites have used federal funds to enforce anti-loitering ordinances, and in Sioux Falls, South Dakota, the local police, with the help of the FBI and ATF, enforce curfew violations.

Having encouraged these efforts, the federal government now has an important role to play in defending communities' ability to use these tools to fight crime. If the Supreme Court affirms the Illinois Supreme Court's holding that the Chicago ordinance is unconstitutional, the validity of other anti-loitering ordinances and other public order measures could be called into question. Such a result would thus implicate federal efforts to fight gangs and control illegal drug trafficking and violence in Chicago and around the country.

4. The Federal Government Has An Interest in Ensuring That Community Public Order Measures Do Not Infringe Constitutional Rights

In its review of the Chicago anti-gang loitering ordinance, the Supreme Court may well delineate the constitutional parameters for such anti-loitering ordinances and public order laws generally. Both parties in this case have taken an absolute position on the question of the constitutionality of the Chicago ordinance. By contrast, the federal government can offer a balanced view -- one that both supports the interests of law enforcement and has a high regard for the importance of protecting individual civil liberties.

In the case before the Supreme Court, the City of Chicago will argue that its anti-loitering ordinance is constitutional both on its face and as applied. Chicago will cite police guidelines that accompany the ordinance and dictate how it must be applied to prevent its arbitrary enforcement.[10] These guidelines require a police officer to have probable cause that a member of a criminal street gang is loitering, limit a police officer's discretion by requiring an officer to

[10] General Order No. 92-4 (Effective date, August 8, 1992), reprinted in Pet. App. 64a-73a.

have "specific, documented and reliable information" of gang membership, and set forth a process for determining the specific locations where the ordinance can be enforced.[11]

At the same time, the respondents will argue that the Chicago ordinance is unconstitutional and that the use of broad anti-loitering ordinances opens the door to abusive and discriminatory enforcement practices. Indeed, there are components within the Department of Justice that believe that the Chicago ordinance is overly broad, particularly in its reach beyond gang members.

The federal government, by participating in this case, can provide guidance to the Supreme Court on how to approach the question of whether the anti-gang loitering ordinance, and other similar types of public order laws, can withstand constitutional scrutiny, recognizing that there are ways to limit the potential for police abuse, as reflected in the Chicago administrative guidelines. In addition, this case provides a likely vehicle for the Supreme Court to reinterpret, and possibly narrow or overrule, its 1972 decision in Papachristou v. City of Jacksonville, 405 U.S. 156. The federal government is uniquely positioned to present legal theories to the Court that would both serve the interest in fighting crime and the need to protect civil liberties. No other participant in the case can be expected to give the court tailored and balanced guidance on the appropriate development of the law in this area.

CONCLUSION

The outcome of this case could significantly affect the federal government's efforts to reduce criminal street gang activity. The ordinance has helped our work with state and local law enforcement, our community policing program, and our strategy to encourage local use of innovative crime-fighting strategies, including enforcement of a range of public order laws.

RECOMMENDATION

The Office of Policy Development recommends amicus curiae participation in support of the City of Chicago, provided that you conclude that the ordinance withstands constitutional scrutiny. The Office of Intergovernmental Affairs, the Office of Juvenile Justice and Delinquency Prevention, and the Drug Enforcement Administration concur in this recommendation. The Executive Office for Weed and Seed recommends against amicus curiae participation.

Eleanor D. Acheson
Assistant Attorney General
Office of Policy Development

Attachment

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[11] Id.; Pet. App. 67a-68a.

APPENDIX

FEDERAL ANTI-GANG PROGRAMS AND INITIATIVES

Multi-Agency Programs and Initiatives

Anti-Violent Crime Initiative. In the Anti-Violent Crime Initiative, the Department of Justice and the Department of the Treasury have combined crime-fighting resources with state and local law enforcement to achieve collectively what no single entity can accomplish on its own. In 1994, the federal government launched the AVCI, a multi-jurisdictional approach that employs a wide array of investigative and prosecutorial tools to attack violent crime, including criminal street gangs. The AVCI serves as an umbrella for cooperative efforts to take place among federal, state, and local law enforcement agencies. These cooperative efforts are then deployed effectively in specific communities in order to target the violent crime problems in the particular area. United States Attorneys serve as their district's Violent Crime Coordinator, and the other participating federal entities include the FBI, DEA, IRS, INS, ATF, the U.S. Marshals Service, the Bureau of Prisons, U.S. Customs, the Park Service, the Fish and Wildlife Service, and the Armed Forces. On May 1996, the Attorney General requested that U.S. Attorneys in each district include a focus on violent gangs in their AVCI enforcement activities.

The AVCI brings under its umbrella numerous task forces and ongoing federal crime-fighting efforts that in the past competed for the attention of and participation from state and local law enforcement. The FBI, DEA, INS, the U.S. Marshals Service, ATF, and the Secret Service all have long histories of working together with local law enforcement in anti-gang and anti-drug activities.

HUD/DOJ. In coordination with HUD, the Department of Justice has launched a coordinated effort to fight violent crime in public housing. The effort focuses on thirteen cities, including Philadelphia, Chicago, Detroit, New Orleans, San Francisco, and Washington, D.C. A primary focus of this effort has been to root out the gang activity in public housing that has made public housing dangerous and unlivable.

Indian Country. There are several federal agencies with law enforcement responsibilities in Indian country. Violent crime in Indian country has increased significantly, corresponding with a significant rise in gang activity. According to a 1997 survey conducted by the Department of the Interior's Bureau of Indian Affairs (BIA), there are 375 gangs with approximately 4,650 members on or near Indian country, which is double the number of gangs identified by BIA in 1994.

The federal government's anti-gang activities in Indian country include the following programs.

1. Twenty-seven FBI field divisions have investigative jurisdiction in Indian country with respect to criminal matters. The FBI shares this responsibility with the BIA.

The FBI has created an Office of Indian Country Investigations within its Violent Crime and Major Offenders Section.

The FBI has adapted its Safe Streets Task Force model to Indian country by creating a Safe Trails Task Force to coordinate anti-gang activities with other federal, tribal, and state law enforcement groups.

2. U.S. Attorneys are responsible for prosecuting major crimes and crimes involving Indians and non-Indians in most of Indian country. The Attorney General has directed those U.S. Attorneys with jurisdiction in Indian country to designate AUSAs to serve as tribal liaisons and work with tribal police, prosecutors, and judges to address youth violence, including gang activity.

3. The BIA has created a Gang Resistance Education and Training (GREAT) program to use tribal and BIA police officers in schools to prevent kids from becoming involved in gangs.

Individual Agency and Component Programs and Initiatives

FBI. The FBI has developed the National Gang Strategy. Using the investigative and prosecutorial theories that have proven successful in the Organized Crime/Drug Program National Strategy, the FBI, in cooperation with other interested federal, state, and local law enforcement agencies, combats criminal street gang activity through sustained, multi-divisional, coordinated investigations leading to successful prosecutions. The National Gang Strategy contemplates support from U.S. Attorneys Offices, including the assignment of a full-time AUSA to significant, long-term investigations, and the development of relationships between AUSAs and their state and local counterparts.

In furtherance of the National Gang Strategy, the FBI has established the Safe Streets Violent Crime Initiative ("Safe Streets"). Under the Safe Streets program, the Special Agent in Charge of each FBI field division can combat criminal street gang activity by sponsoring task forces that coordinate the gang-fighting activities of federal, state, and local law enforcement agencies. As of September 1997, the FBI identified 153 Violent Crime/Gang Task Forces composed of 726 FBI Special Agents, 175 other federal agents, and over 1,100 state and local law enforcement officials. The FBI also maintains a Violent Gang and Terrorist Organizations File in the FBI's criminal history information system to support the gang-fighting efforts of local law enforcement officials.

DEA. Because the lifeblood of most gang activity in the nation is drug trafficking, DEA has a long history of participating in multi-jurisdictional, anti-gang task forces. DEA's primary tool to assist in coordinated gang investigations is the Mobile Enforcement Team (MET). METs are deployed at the request of local police chiefs, sheriffs, or district attorneys to work in concert with local police to dislodge violent drug offenders from the community.

U.S. Marshals Service. The Marshals Service works with state and local law enforcement in their efforts to locate and arrest federal fugitives, including gang members and their associates. In 1995, the U.S. Marshals Service participated in 140 task forces as part of the AVCI and arrested 12,500 fugitives.

INS. INS has formed Violent Gang Task Forces in sixteen major cities. These task forces target criminal street gangs comprised primarily of aliens.

Federal Grant Programs

Office of Juvenile Justice and Delinquency Prevention (OJJDP). OJJDP administers a number of grant programs to enable communities to combat gang activities. These include discretionary grants as part of the Comprehensive Community-Wide Approach to Gang Prevention, Intervention, and Suppression. Recipients of this grant develop and implement a comprehensive gang program. Other OJJDP grants fund mentoring programs for juvenile delinquents, a career preparation initiative, local police departments to enable them to develop innovative strategies to combat gang violence, and a program to enable the designated Empowerment Zones to implement youth-oriented community policing.

For FY 1998, Congress allocated $250 million for a new program, the Juvenile Accountability Incentive Block Grant. Grant recipients may use these funds for, inter alia, hiring additional prosecutors to enable them to address gang, drug, and youth violence activities more effectively.

COPS. The COPS program is putting up to 100,000 new police officers on the streets. Under the authority delegated to her in the 1994 Crime Act, the Attorney General carried out her responsibility to fund the 100,000 additional officers by creating the Office of Community Oriented Policing Series. The officers who are funded by the COPS program conduct community policing and enter into close partnerships with affected communities to attack endemic community problems, such as gang activity. In addition, between 1994 and 1996, COPS selected fifteen sites, including Chicago, to participate in an Anti-Gang Initiative. Grant recipients used the funds to develop innovative, community-specific approaches to gang problems, including using the police to target known gang gathering places, combating gang intimidation, and mobilizing communities.

In 1997, the COPS program instituted Problem-Solving Partnerships to enable communities to enter into partnerships with local police and sheriff's departments to address specific neighborhood problems, including loitering. Thus far, $40 million in grants have been distributed to over 450 communities to form Problem-Solving Partnerships.

Weed and Seed. The Weed and Seed grant program, established in 1991, pioneered the adoption on a nationwide basis of community-based crime prevention and control strategies. At participating Weed and Seed sites, the U.S. Attorneys provide leadership to communities to

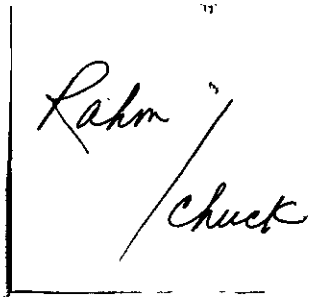
develop and implement comprehensive strategies to "weed out" violent crime, including gang activity, and "seed" the neighborhood through economic and social revitalization. For FY 1998, Congress appropriated $33.5 million to fund 176 sites, which receive an additional $9 million in Weed and Seed monies from the Asset Forfeiture Fund.

Consistent with the philosophy of the Weed and Seed program that relies on community policing and community residents to identify the problems their communities face, Weed and Seed grantees have adopted a range of strategies to deal with criminal street gangs. These strategies include prevention programs designed to persuade children to stay away from joining a gang and to teach non-violent means of conflict resolution.

Weed and Seed grants also have been used for multi-jurisdictional criminal investigations. In Chicago, for example, Weed and Seed contributed $250,000 in Asset Forfeiture to the Joint Task Force on Gangs. The Task Force, which included federal officials from the FBI and the IRS, and state and local officials from the Chicago Housing Authority Police, the Chicago Police Department, the Cook County Sheriff's Office, and the Illinois State Police, conducted an investigation that led to the indictment of members of a leading Chicago gang, the Gangster Disciples. The City Attorney's office in Los Angeles has pioneered the "gang abatement" concept to eradicate gang activity from a neighborhood Weed and Seed site. Under this approach, the City files civil nuisance lawsuits against gangs and individual gang members and obtains an anti-gang injunction prohibiting the enjoined parties from operating in particular areas and associating with other gang members.

Bureau of Justice Assistance (BJA). BJA has grant monies to fund demonstration projects that are designed to combat criminal street gang activity. One such grant program allocates funds to assist state and local prosecutors in carrying out their drug enforcement strategy. Another BJA grant program, the Comprehensive Gang Initiative, provides monies to community police and social services agencies to aid them in developing a multi-disciplinary, multi-task, and problem-solving approach to gang activity.

HUD's Public Housing Drug Elimination Program. In FY 1997, Congress authorized $250 million for this HUD-operated grant program designed to empower residents of public housing to combat drugs and drug-related crime in their communities through community policing and drug and crime elimination strategies. Grant funds may be used to employ security personnel and investigators; reimburse local law enforcement for additional security; and support voluntary tenant patrols.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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CITY OF CHICAGO, PETITIONER

v.

JESUS MORALES, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a loitering ordinance making it a misdemeanor to disobey a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains one or more members of a criminal street gang, is impermissibly vague in violation of the Due Process Clause.

2. Whether petitioner's ordinance, which requires a group of loiterers containing one or more criminal street gang members to obey a police order to move on, violates substantive due process guarantees.

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INTEREST OF THE UNITED STATES

The federal government has identified the control of gang-related crime and violence as an important priority. For example, in 1995, the Department's Office of Community Oriented Policing Services funded an Anti-Gang Initiative, which awarded $11 million in grants to a number of cities (including Chicago) to pursue various locally developed anti-gang strategies. [citation]. The Federal Bureau of Investigation has developed a National Gang Strategy for working with state and local governments to identify gang problems and to employ the anti-gang resources of each level of government in a coordinated and effective manner. [citation].

Anti-loitering enforcement efforts have been part of the effort to coordinate law enforcement and community development activities under the federal Weed and Seed Program [statutory cite]. Congress has supported local efforts to address the problem of criminal street gangs by providing for enhanced penalties when certain federal crimes are committed in connection with such gangs. 18 U.S.C. 521.

The Chicago ordinance at issue in this case is one of several possible approaches to the problem of gang violence. The ordinance appears to have had a significant impact on gang violence in Chicago [OPD is getting enforcement dates and crime stats]. The federal government has a strong interest in supporting the efforts of local communities like Chicago to identify the law enforcement strategies best suited to each community's needs to combat gangs and gang-related violence.

STATEMENT

This case arises from respondents' challenges to their convictions for violating the City of Chicago's gang loitering ordinance. The Illinois Supreme Court held that the ordinance was unconstitutionally vague on its face and violated substantive due process.

1. In May 1992, the Chicago City Council enacted the gang

loitering ordinance at issue in this case after a series of hearings. In formal findings enacted as a preamble to the ordinance, the Council found that the "the continuing increase in criminal street gang activity * * * is largely responsible for" the City's increasing rate of murder and other violent and drug-related crimes. Pet. App. 60a. The Council also found that "[i]n many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." Ibid. The Council found that "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." Ibid. Gang members "maintain[] control over identifiable areas by continued loitering," but they "avoid arrest by committing no offense punishable under existing laws when they know the police are present." Ibid. As a result, "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." Ibid.

The ordinance itself provides in pertinent part:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons,

> he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance provides that "[i]t shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang." Id. at 61a. Each violation of the ordinance is punishable by a fine of up to $500, imprisonment for not more than six months, and performance of up to 120 hours of community service. Id. at 63a.

The ordinance defines each of its key terms. The ordinance provides that "'[l]oiter' means to remain in any one place with no apparent purpose." Pet. App. 61a. **The definition of "[c]riminal street gang" is modeled in part upon the definition in the 1994 federal statute enhancing penalties for certain federal crimes when they are committed in connection with a criminal street gang. 18 U.S.C. 521 (which in turn was modeled in part upon the definitions of organized criminal activity found in the federal RICO statute, 18 U.S.C. 1961). [citation for relation of statutes?]** A "[c]riminal street gang" is defined as "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more [of a series of enumerated crimes], and

whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Pet. App. 61a-62a. The enumerated crimes include murder, aggravated assault or battery, intimidation, robbery and armed robbery, arson, possession of explosives, bribery, and drug trafficking. Id. at 62a. "Criminal gang activity" is defined as the commission or attempted commission of any of those enumerated crimes, so long as they are committed by two or more persons or by an individual acting "at the direction of, or in association with, any criminal street gang" and with the specific intent to "further[] or assist in any criminal conduct by gang members." Id. at 62a. Finally, a "[p]attern of criminal gang activity" is defined as "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of [the ordinance]." Id. at 63a.

After the City Council adopted the ordinance, the Police Department issued a general order that provided further guidance regarding the terms of the ordinance. The order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a-69a. The general

order also provides that "[p]robable cause to establish membership in a criminal street gang must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific, documented and reliable information." Id. at 67a. Such information would include items such as an individual's admission of membership, the wearing of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant. Id. at 67a-68a. The general order provides that gang membership "may not be established solely because an individual is wearing clothing available for sale to the general public." Id. at 67a.

2. Respondents are 70 defendants who were charged with violating the gang loitering ordinance. Pet. App. 1a. Six of them were found guilty after separate bench trials and sentenced to jail terms from one to 27 days. Id. at 1a-2a. The trial courts dismissed each of the other cases, finding the ordinance unconstitutional on a variety of grounds. Id. at 1a. The state appellate court reversed the convictions and affirmed the dismissals. Id. at 1a-2a.

3. The Illinois Supreme Court held that the ordinance "violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." Pet.

App. 5a.

a. The court held that the ordinance is not "sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct." Pet. App. 7a. In the court's view, the term "loiter," even as defined by the ordinance to mean "to remain in any one place with no apparent purpose," is not "sufficiently definite so that ordinary persons can comprehend the prohibited conduct." Id. at 9a, 10a.

The court also held that the other elements of the offense do not cure the difficulty. The court construed the ordinance to include the additional element "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member," but concluded that this element too is vague because "[a]n individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." Pet. App. 11a-12a. The court added that "even adding a knowing association with a gang member to the act of loitering is still insufficient because the city cannot 'forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature.'" Id. at 12a.

The court also held that the element of failure to obey a police dispersal order "is * * * insufficient to cure the vagueness of the ordinance." Pet. App. 12a. In the court's view, that conclusion was dictated by Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-92 (1965), in which this Court stated that a statute prohibiting standing or loitering after having been requested by a police officer to move on would be unconstitutional.

b. The court also held that the ordinance "provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement." Pet. App. 15a. In particular, the court believed that the definition of the term "loiter" "provides absolute discretion to police officers to decide what activities constitute loitering." Ibid. The court also stated that the ordinance gives police "complete discretion to determine whether any members of a group are gang members." Ibid. The court acknowledged that the police general order "goes to great lengths to define criminal street gangs." Id. at 16a. But the court stated that the general order "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." Ibid.

c. With respect to the substantive due process challenge to the ordinance, the court referred to activities such as "loafing,

loitering, and nightwalking," and held that "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause." Pet. App. 17a. The court stated that the gang loitering ordinance "impedes upon" a number of "protected personal liberties," including "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Id. at 18a (citations omitted). Although the court recognized that these liberties "are not absolute," the court found "that the gang loitering ordinance unreasonably infringes upon personal liberty." Ibid. In the court's view, "[p]ersons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." Ibid.

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem of gang-related crime and violence has dramatically increased in recent years. Criminal street gangs increasingly attempt to control entire neighborhoods, intimidating the law-abiding citizens who live there and making it impossible for them to enjoy the amenities of public life. Experience has repeatedly demonstrated that, once such gangs take control of the

sidewalks and streets, the ordinary social mechanisms that tend to inhibit crime and other anti-social behavior cease working. Although attacking the homicides, drug crimes, and other serious crimes that gangs commit is one facet of the solution, a coordinated approach may also involve targeted community-based efforts to reacquire control of the streets from violent street gangs and restore public spaces to the use and enjoyment of the vast majority of residents. The Chicago gang loitering ordinance is a reasonable and narrowly tailored approach to achieving that goal in the particular circumstances faced by a city that has been one of the most hard-hit by gang violence.

The gang loitering ordinance is not unconstitutionally vague. Because the ordinance applies only to those who loiter for "no apparent purpose," it excludes from its scope those whose presence in a public place has as its purpose the expression of ideas protected by the First Amendment. Each of its key terms are carefully defined and have a meaning that would be comprehensible to persons of ordinary intelligence and common sense. The term "loiter" is defined to mean "to remain in any one place with no apparent purpose." Pet. App. 61a. That is not an unintelligible standard. Moreover, the ordinance imposes additional requirements for a conviction, including proof "that the arresting officer have

a reasonable belief that one person in a group of loiterers is a gang member," id. at 11a, and -- most significantly -- proof that the defendant has received and disobeyed a police order to disperse. Taken together, those requirements are sufficient to give fair notice to persons subject to the ordinance how they may conform their conduct to the law.

The ordinance also contains standards that satisfactorily confine police enforcement discretion. It does not permit police to sweep the streets of persons whom they find undesirable or annoying, or to remove minority or disfavored groups from the City. Instead, in light of the careful definition of each of its terms and the further requirements in the general police order, it permits the police to apply the ordinance only in areas where gang activity has threatened the local community and only against persons who, by virtue of their membership in criminal street gangs or their participation in groups containing such members, pose a particular threat to the community. Even as to such persons, the ordinance simply prohibits them from loitering in groups, and it authorizes arrests only of individuals who disobey police orders to disperse. In short, the ordinance provides far more notice and far more precise standards for enforcement than did the standardless ordinances this Court found unconstitutionally vague in

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and Coates v. City of Cincinnati, 402 U.S. 611 (1971), or the ordinance that this Court commented would be unconstitutional in Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).

The ordinance also does not violate substantive due process guarantees. It implicates two specific liberty interests -- the interest of gang members in standing in groups on the streets and sidewalks and in other public places in designated areas of the city, and the interest of non-gang members in standing in public places with gang members in those designated areas. Those interests are not commensurate with any of the fundamental liberty interests -- affecting the most intimate personal relations and the core of family life -- whose infringement may be justified only if narrowly tailored to serve a compelling state interest. Moreover, the City's interest in public safety, which forms a part of the justification for the ordinance, has frequently been found sufficient to justify substantially more serious intrusions on personal liberty, such as pretrial confinement on the basis of future dangerousness. United States v. Salerno, 481 U.S. 739, 748 (1987). And the specific prohibitions of the ordinance are narrowly tailored to advance the purposes of the ordinance in returning the City's public spaces to law-abiding citizens and

ultimately reducing the level of crime, fear, and violence in the specific areas of the City plagued with gang violence and intimidation.

ARGUMENT

I. THE GANG LOITERING ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE

A. The Ordinance Provides Reasonable Notice, In At Least A Wide Range Of Its Applications, Of What Conduct Is Prohibited

The vagueness doctrine is based on the proposition that, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Laws that fail to provide that kind of notice "may trap the innocent by not providing fair warning," ibid., and they therefore fail to satisfy due process standards.

The fact that a law has some imprecision, however, is not sufficient to render it unconstitutional. "Condemned to the use of words, we can never expect mathematical certainty from our language." Id. at 110. Moreover, the fact that the terms used in a statute have uncertain application to some conceivable conduct is insufficient to support a ruling, like that of the Illinois Supreme

Court in this case, that the statute is unconstitutional on its face. Instead, under well-settled standards, facial invalidation is permissible only if the challenged law is "impermissibly vague in all of its applications." Village of Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982). If the challenged law imposes reasonably intelligible standards in some factual settings, the law may constitutionally be applied in those settings; vagueness questions that arise in other settings should be resolved if and when cases involving as-applied claims in those settings arise. See, e.g., Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."); United States v. Powell, 423 U.S. 87, 92-93 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975).

1. Although the vagueness doctrine in general imposes only a modest restriction on the framing of criminal laws, "a greater degree of specificity," Smith v. Goguen, 415 U.S. 566, 573 (1974), is imposed where the challenged law regulates expressive conduct protected by the First Amendment. Such laws require special treatment to avoid a chilling effect on expression that may be close to the line of illegal conduct. See Village of Hoffman

Estates, 455 U.S. at 499; Grayned, 408 U.S. at 109.

The Chicago gang loitering ordinance does not limit expression protected by the First Amendment and is therefore not subject to this more stringent test. If a group of people standing in a public place are engaged in expressive conduct protected by the First Amendment, such as picketing, holding a demonstration, campaigning for a candidate, or gathering signatures on a petition, it can be expected that the group's message -- and its purpose of conveying that message -- would be apparent to outsiders. The ordinance's definition of "loitering," however, applies only to those who are standing in a public place "with no apparent purpose." Pet. App. 61a. Therefore, the ordinance by its terms has little or no application to those who are gathered for the purpose of engaging in protected expression.

Nor does the gang loitering ordinance limit the freedom of association. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court explained that two different sorts of freedom of association have received constitutional protection. One sort relates to "choices to enter into and maintain certain intimate human relationships," id. at 617, which generally involve "the creation and sustenance of a family" through "marriage, childbirth, the raising and education of children, and cohabitation with one's

relatives," id. at 619 (citations omitted). Those rights, which are protected as "fundamental element[s] of personal liberty" protected by the Due Process Clause, id. at 618, are not implicated by the gang loitering ordinance.

The other sort of conduct that comes within the freedom of association involves "a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 618.[1] The Illinois Supreme Court correctly stated that the government may not "forbid, on pain of criminal punishment, assembly with others merely to advocate activity." Pet. App. 12a (citing, inter alia, Brandenburg v. Ohio, 395 U.S. 444, 448-449 (1969)). But the gang loitering ordinance, as noted above, does not forbid such assembly, because those exercising this right of assembly have expressive activity ("advocacy") as their purpose. The ordinance, by contrast, prohibits only association "with no apparent purpose." The First

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[1] In the Illinois Supreme Court, respondents argued that the ordinance impinged on protected expression because those subject to the ordinance may be talking while they are loitering. See Defendants-Appellees Ill. Sup. Ct. Br. 13-14. The ordinance, however, does not prohibit or regulate talking. It merely requires those loitering with criminal street gang members to move on when ordered to do so.

Amendment does not include "a generalized right of 'social association' that includes chance encounters," City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989), and the ordinance therefore is not subject to the heightened review for vagueness applicable to laws that affect First Amendment rights of expression.

2.a. Under ordinary vagueness standards, the ordinance is constitutional. The ordinance defines the term "loiter" to mean "to remain in any one place with no apparent purpose." That is not an unintelligible standard. As the Illinois Supreme Court indicated, application of the ordinance does not turn on the actual purpose of the group of suspected gang loiterers, but whether that purpose is "apparent to an observing police officer." Pet. App. 10a. Moreover, the terms of the ordinance suggest that the "apparent purpose" inquiry is based on the apparent purpose for "remain[ing] in any one place." Thus, a group that is talking or smoking while remaining in one place would not ordinarily have an apparent purpose, since it would rarely be apparent to an observer that the group's purpose for remaining in that place -- rather than walking or moving elsewhere -- was to talk or smoke.[2] Finally, the

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[2] It is a factual question in each case whether a group has an apparent purpose for remaining in one place. For example, there may be circumstances in which a group's apparent purpose for remaining in one place is to smoke cigarettes -- for example, where

purpose simply to stand on a corner can not be an "apparent purpose" under the ordinance; if it were, the ordinance would prohibit nothing at all.

Applying those standards, it could be expected that individuals standing on a street corner or in front of a school or business and making no effort to enter a building or to engage in conduct conveying a message would be held to fall within the definition given in the ordinance. On the other hand, individuals attending a sporting event, waiting in line to enter a theater, or waiting at a bus stop until a bus arrives would plainly fall outside that definition.[3] The term "loiter" therefore has a "core" meaning that distinguishes proscribed from permitted conduct.

It is noteworthy that, insofar as it was litigated at all, the

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the group is smoking during business hours outside an office building in which smoking is known to be prohibited. Far from suggesting that the ordinance is vague, such examples demonstrate that the standard embodied in the ordinance may be intelligibly applied to a variety of factual circumstances.

[3] The Illinois Supreme Court suggested that the purpose of "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower" will "rarely be apparent to an observer." Pet. App. 12a. Although factual variations could affect each case, we doubt that the court was correct. Ordinarily, the conduct of people waiting to hail a taxi, for example, would make their purpose quite apparent to any observer, and the same may well be true of the other instances mentioned by that court.

"no apparent purpose" issue was resolved as a straightforward question of fact in each of the four cases in which respondents were found guilty after a full trial.[4] In one case, the respondent claimed that he was walking to meet his mother. Chicago v. Gutierrez, 4/12/94 Tr. 25-26. In another case, the respondent claimed that he was walking home from the hospital. Chicago v. Morales, 9/20/93 Tr. 17-18. In still another case, the respondent says he was walking out of a store to rejoin a friend who had waited outside with a group of others. Chicago v. Washington, 7/14/94 Tr. 28-29. In the fourth case, respondent Jose Renteria did not testify, and there was thus no claim that the respondent had an apparent purpose in standing on the street. In each of these cases, the trial court rejected the factual premises of the defenses; there was no confusion about what constituted an "apparent purpose." The experience in trying cases under the ordinance thus shows that the term "loitering" has a core meaning

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[4] The other two cases that resulted in convictions were tried on stipulated facts or testimony. In Garvin's case, the stipulated testimony included the fact that respondent Garvin was loitering. See Br. for Defendant-Appellant at 3, Chicago v. Garvin, No. 93-4356 (App. Ct. of Ill., First. Div.). In Jimenez's case, the stipulated facts simply included a recitation that respondnet Jimenez "knowingly remained at a known designated location for criminal street activity, after being informed by a police officer to disperse from this area." Br. for Defendant-Appellant at 3, Chicago v. Jimenez, No. 93-4351 (App. Ct. of Ill., First Div.).

that is sufficient to preclude a facial vagueness challenge. Possible unconstitutional applications, or questions about the interpretation of the ordinance's standard at the margins, should be resolved on an as-applied basis.

A comparison with the ordinance this Court held unconstitutionally vague in Coates v. City of Cincinnati, 402 U.S. 611 (1971), is instructive. The operative language in the ordinance in Coates prohibited three or more people from assembling on a sidewalk and "conduct[ing] themselves in a manner annoying to persons passing by." Id. at 611. Noting that "[c]onduct that annoys some people does not annoy others," id. at 614, the Court explained that therefore rather than "requir[ing] a person to conform his conduct to an imprecise but comprehensible normative standard, * * * no standard of conduct is specified at all." Ibid. Unlike the ordinance in Coates, the term "loiter" in the Chicago gang loitering ordinance does specify a standard of conduct. At least in combination with the other requirements of the ordinance, it is not unconstitutionally vague.

b. The Illinois Supreme Court acknowledged that "persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter.'" Pet. App. 9a. But the court stated that "such term by itself is inadequate to inform a citizen of its criminal

implications." Ibid. In the court's view, "[t]he infirmity" of the use of the term "is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" Ibid. (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972)). Even as defined by the ordinance, the court held, "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." Id. at 10a.

The Illinois Supreme Court's reasoning is unsound. It is not the task of a court, in adjudicating a vagueness challenge to a statute, to determine whether the statute criminalizes only "conduct calculated to cause harm." It is up to the legislature to determine what conduct is likely to cause harm in a given community, and the City Council's determination that gang loitering is likely to cause harm in Chicago was fully supported by the record and should be conclusive. Nor does the constitutionality of an ordinance depend on whether it "makes criminal activities which by modern standards are normally innocent." Social problems -- and tolerance of disorder -- vary among different communities and even in the same community at different times. It is a part of the substantive due process inquiry, see pp. __-__, infra, to determine

whether a particular prohibition falls within a community's wide discretion to subject particular conduct to the sanctions of the criminal law. Judicial second-guessing of a community's determinations regarding conduct that should be criminalized is not, however, a part of the vagueness inquiry. If conduct is adequately defined in a criminal statute to give fair notice and avoid standardless discretion, the fact that it is "by modern standards * * * normally innocent" is "not a defect of clarity." Village of Hoffman Estates, 455 U.S. at 497 n.9.

3. Conviction under the ordinance requires not only proof of loitering, but also proof of other requirements as well. The addition of those elements is sufficient to satisfy fair notice requirements, regardless of any indeterminacy that may inhere in the term "loiter," as defined by the ordinance.

a. As the Illinois Supreme Court recognized, proof of a violation of the ordinance requires proof "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member." Pet. App. 11a. In at least a great many cases, persons subject to the statute can be expected to know whether they are loitering with gang members and whether the police officer issuing the order has a reasonable belief that gang members are present. Indeed, because it is important to the gang to assume

visible control over an area, members of gangs often wear distinctive clothing, colors, and insignia; they wear those items in distinctive ways; they employ distinctive hand signals; and they frequently freely admit to their membership in the gang.[5] The intimidating effect of gang loitering -- one of the primary evils against which the ordinance was directed -- results precisely because gang members and affiliates loitering in public places make their status as gang members clear to onlookers. In addition, the gang's recruiting function -- also a target of the ordinance -- depends on easy recognition of the gang affiliation of a group of

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[5] For example, in the case of at least three of the four respondents who were found guilty after a full trial of violating the ordinance, the police officers testified that respondents and/or others in the group with which they were loitering admitted gang membership. See Chicago v. Gutierrez, 4/12/94 Tr. 11-12; Chicago v. Morales, 9/20/93 Tr. 7; Chicago v. Washington, 7/14/94 Tr. 10, see also id. at 4. In the fourth case, although the police officer did not testify regarding whether the defendant had admitted his gang membership, the officer did state that gang members "admit they are gang members and they are very proud of it." Chicago v. Renteria, 9/29/94 Tr. 13; see also id. at 11 (gang members "readily admit" membership). See note __, supra (two other respondents found guilty after trials on stipulated evidence). In addition, the use by gang members of distinctive clothing, colors, and hand signals is well-attested. As a recent monograph published by a Department of Justice component noted in its definition of "street gang," "[t]he group frequently identifies with or claims control over specific territory (turf) in the community, wears distinctive dress and colors, and communicates through graffiti and hand signs." Bureau of Justice Assistance, Urban Street Gang Enforcement 30 (1997).

loiterers. See id. at 2a (City Council heard testimony that "gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents."). Accordingly, individuals may in most cases readily determine whether they are engaging in gang loitering subject to the ordinance.[6]

b. The ordinance also requires proof that the defendant failed to obey a police order to disperse. Even if fair notice were a close question based on the other requirements of the statute, this element would be sufficient to cure any problem. A person of ordinary intelligence and common sense who receives a police order to disperse under the ordinance should be in no doubt about "what is prohibited" and should easily be able to "act

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[6] There may be cases in which a defendant can show that he had no way to determine whether or not a police officer could have had a reasonable belief that a gang member was present in a group of loiterers. If such a case arises, the question presented would be whether the other requirements of the statute -- especially the requirement of an order to move on -- were sufficient to have given the defendant "a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Regardless of the answer to that question, the existence of some such cases could not be sufficient to render the statute unconstitutionally vague on its face -- i.e., incapable of application even where the gang affiliation of members of a group of loiterers is in no way unclear. Cf. Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

accordingly." Grayned, 408 U.S. at 108. Criminal statutes ordinarily are enforced with far less specific notice than occurs under the Chicago gang loitering ordinance. A person who fails to obey a police order to disperse under the ordinance cannot complain of lack of fair notice.

This Court's decision in Colten v. Kentucky, 407 U.S. 104 (1972), makes clear that there is fair notice under the ordinance. In Colten, the statute under challenge prohibited "[c]ongregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse," when done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." See id. at 108. This Court rejected the defendant's argument that the statute did not provide fair notice, explaining that a person who satisfies the other elements of the statute "should understand that he could be convicted under [the statute] if he fails to obey an order to move on." Id. at 110. The ordinance in this case requires the same police dispersal order as in Colten. Accordingly, as in Colten, "citizens who desire to obey the statute will have no difficulty in understanding it." Ibid.

The Illinois Supreme Court ignored Colten in its analysis of fair notice. Instead, that court relied on Shuttlesworth v. City

of Birmingham, 382 U.S. 87, 90 (1965), in which this Court noted that an ordinance that, without more, made it "unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on" would be unconstitutionally vague. The Illinois Supreme Court stated that "[t]he proscriptions of the gang loitering ordinance are essentially the same as the Shuttlesworth ordinance" and relied upon Shuttlesworth for the principle that "if the underlying statute is itself impermissibly vague, * * * then a conviction based upon failure to obey the order of a police officer pursuant to that statute cannot stand." Pet. App. 13a.

The Chicago gang loitering ordinance is not "essentially the same" as the ordinance in Shuttlesworth. The ordinance in Shuttlesworth, "[l]iterally read, * * * says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer." 382 U.S. at 90. That, together with the ordinance's "ever-present potential for arbitrarily suppressing First Amendment liberties," id. at 91, was the basis for this Court's ruling. In contrast, the Chicago gang loitering ordinance, especially together with the accompanying police order, has extensive definitions of its key terms that very substantially limit police discretion, see pp. __-__, infra, and it does not

substantially affect expressive activities protected by the First Amendment.

Shuttlesworth does not, as the Illinois Supreme Court stated, stand for the principle that a police order requirement could not cure any vagueness that could be seen to inhere in any of the other requirements of the ordinance. Even where a statute regulates expression and therefore is subject to particularly stringent vagueness requirements, the statute as a whole may provide fair notice despite the fact that some of its elements, taken alone, fail to do so. Reno v. ACLU, 117 S. Ct. 2329, 2345 (1997) ("Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague."). Similarly here, the ordinance as a whole -- including in particular the police order requirement -- provides fair notice of the conduct that it prohibits, so that individuals may conform their conduct to law.

B. The Ordinance Does Not Encourage Arbitrary And Discriminatory Enforcement

The "more important aspect of the vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983). The ordinance satisfies that requirement.

1. As noted above, the key terms in the statute are carefully defined. The ordinance provides that individuals may be asked to move on only based on a reasonable belief that they are "loitering" -- a defined term whose meaning has already been discussed -- with one or more persons, at least one of whom is reasonably believed to be a gang member. A "gang" is defined as a group of three or more persons that has "as one of its substantial activities" the commission of enumerated serious criminal offenses, and whose members commit, attempt to commit, or solicit the commission of those offenses, provided that they are committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Pet. App. 61a-62a. That definition substantially limits police discretion. In precise terms, it aims the statute's prohibitions at those who choose to affiliate with criminal organizations. Even as to those persons, it may not be used simply to arrest all members of such organizations, but simply requires them to move on when ordered to and continue their activities -- whatever they may be -- without loitering. Cf. Lanzetta v. New Jersey, 306 U.S. 451 (1939) (holding unconstitutionally vague statute making it a crime to be a gang member who has no occupation and has been convicted of a prior offense).

The Chicago ordinance does not suffer from the vices of the

ordinance before this Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 156-157 n.1 (1972). That ordinance included a list of crimes -- including nightwalking, wandering about from place to place without any lawful purpose or object, loafing, living upon the earnings of one's wife -- that was "so all-inclusive and generalized" that "those convicted may be punished for no more than vindicating affronts to police authority." Id. at 166-167. The fact that in Papachristou there were "no standards governing the exercise of the discretion granted by the ordinance," id. at 170, permitted police in effect to criminalize the failure by disfavored groups "to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." Ibid. By contrast, no one is guilty of a crime under the Chicago ordinance merely because of lifestyle, and even those subject to the act are not made criminals, but are merely required to keep moving when requested to do so by police under the ordinance.

2. This Court has frequently considered administrative enforcement guidelines in evaluating vagueness claims. For example, in Village of Hoffman Estates, the Court relied in part on guidelines "prepared by the Village Attorney," 455 U.S. at 492-493 & n.3, in holding that the terms in a local drug paraphernalia

ordinance were not unconstitutionally vague. Id. at 500-501 & n.18; see also id. at 504 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").[7]

The police order in this case further limits the discretion granted the police. First, the general order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a-69a. The order therefore limits the enforcement of the ordinance to specific areas of the city in which gang loitering poses a present threat and in which reasonably thorough and nondiscriminatory enforcement is a practical, achievable goal. That in itself vitiates the possibility that the ordinance could be used as a general license

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[7] See also Kolender v. Lawson, 461 U.S. 352, 355 (1983) (court must "consider any limiting construction that a state court or enforcement agency has proffered") (emphasis added); Parker v. Levy, 417 U.S. 733, 754 (1974) ("[E]ven though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative * * * sources, further content may be supplied even in these areas by less formalized custom and usage."); Ehlert v. United States, 402 U.S. 99, 105, 107 (1971) (relying on "reasonable, consistently applied administrative interpretation" and "letter included in the briefs" from administrative authorities regarding "present practice").

to trap or harass disfavored individuals throughout the city.

Second, the general order includes detailed instructions concerning how police officers may establish that an individual is a gang member. The order provides that such membership "must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific documented and reliable information." Pet. App. 67a. The order goes on to detail the types of information that would be sufficient in this regard (e.g., an individual's admission of membership, the wearing of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant, id. at 67a-68a) as well as some types of information that would be insufficient (e.g., the wearing of "clothing available for sale to the general public," id. at 67a).

Taken together, the definition of the key terms in the ordinance itself and the further specifications in the police general order limit the enforcement discretion of police officers well within reasonable standards. The ordinance therefore does not suffer from the defect of the statute held unconstitutional in Kolender v. Lawson, which required individuals to provide "credible and reliable" identification to police officers on request, and which "contain[ed] no standard for determining what a suspect has

to do in order to satisfy [that] requirement." 461 U.S. at 358. The ordinance also does not remotely resemble the wide-ranging ordinances that delegated virtually standardless discretion to the police in Papachristou, Coates, or Shuttlesworth, to stop and/or arrest anyone they wished.

II. THE CHICAGO GANG LOITERING ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS GUARANTEES

This Court has held that the Due Process Clause has a substantive component, which "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." County of Sacramento v. Lewis, No. 96-1337 (May 26, 1998), slip op. 5. The "core of the concept" of substantive due process is "protection against arbitrary action," and against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." Id. at 10, 11. It "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) (citations and internal quotation marks omitted).

A. The Ordinance Implicates Liberty Interests

1. This Court has noted that substantive due process analysis requires "a careful description of the asserted fundamental liberty interest." Glucksberg, 117 S. Ct. at 2268 (internal quotation marks omitted); see Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("The doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever we are asked to break new ground in this field.").

The Illinois Supreme Court described a number of liberty interests it believed were at stake in this case. It stated that activities such as "loafing, loitering, and nightwalking" are "amenities of American life," and "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause." Pet. App. 17a (citing Papachristou, 405 U.S. at 164). The court also referred to "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Pet. App. 18a (citations omitted). In the court's view, "[t]he gang loitering ordinance impedes upon [sic] all of these personal liberty interests." Ibid.

We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in

standing on sidewalks and in other public places, and in traveling, moving, and associating with others. But characterization of the interests at that level of generality is of limited utility in this case, because in ordinary application the gang loitering ordinance does not deprive individuals of some of those interests (e.g., the interests in traveling and moving) at all, and it deprives individuals of other interests (e.g., standing in public places and associating with others) only to a limited extent and only in some circumstances. Although the justifications for the gang loitering ordinance may not be sufficient to justify depriving all citizens of Chicago of these interests in their entirety, the justifications may be sufficient to justify the ordinance's much more limited effect. Accordingly, a more tailored description of the liberty interest at stake in this case is required.

2. The Chicago gang loitering ordinance implicates two distinct liberty interests. First, it implicates the interest of gang members in standing in public places with others in areas of the City designated pursuant to the police general order; gang members who do so "with no apparent purpose" may expect to receive police orders to disperse. See Pet. App. 61a (ordinance provides that police officer observing persons engaged in gang loitering "shall order all such persons to disperse and remove themselves

from the area") (emphasis added). Second, it implicates the interest of non-gang members in standing in public places with one or more gang members in designated areas of the City; non-gang members who do so "with no apparent purpose" are also subject to police orders to disperse.

The ordinance has a somewhat different effect on each of those liberty interests. With respect to gang members, the ordinance deprives them of a large part of their interest in standing in public places in the company of others. They may, of course, freely walk with whomever they wish.[8] They may stand wherever they wish in areas of the city not designated by the police general order. Even in designated areas, they may stand where they wish, so long as they do so alone. And they may stand in public places with individuals of their choice in designated areas, so long as their purpose in doing so is not merely to loiter -- i.e., they may do so to attend a sporting event or concert, to exercise their First Amendment rights of expression, to wait for a taxi or bus,

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[8] The Illinois Supreme Court erred when it stated that "[p]ersons suspected of being in criminal street gangs are deprived [by the ordinance] of the personal liberty of being able to freely walk the streets and associate with friends." Pet. App. 18a. The ordinance does not prohibit anyone from "freely walk[ing] the streets." Its effect is limited to prohibiting standing in one place with no apparent purpose with gang members.

etc. But their ability merely to stand on the streets and sidewalks and in other public places in designated portions of the city and socialize with others is severely constricted by the ordinance.

With respect to non-gang members, the ordinance imposes a much more limited restriction. Non-gang members may continue to stand with whomever they want, wherever they want, with one exception: they may not loiter with gang members in designated areas of the city. Of course, although that is a more limited restriction, it potentially affects a far larger number of people.

B. The Interests Supporting The Gang Loitering Ordinance Are Sufficient To Justify Its Limited Intrusion On The Identified Liberty Interests

The recognition of an interest as one encompassed within the meaning of the term "liberty" is only the first step in deciding whether a law violates substantive due process. It then must be determined, based on an objective analysis of "[o]ur Nation's history, legal traditions, and practices," Washington v. Glucksberg, 117 S. Ct. at 2268, whether the government's justifications for overriding the liberty interests at stake are sufficient. The strength of the justification that is required depends upon the nature and character of the liberty interest at stake. See Cruzan v. Director, Missouri Dep't of Health, 497 U.S.

261, 279 (1990) (liberty interest in refusing medical treatment must be balanced against the relevant state interests); Williamson v. Lee Optical of Ok., Inc., 348 U.S. 483, 491 (1955) (state restriction affecting a person's ability to engage in a business must merely be rationally related to a legitimate government purpose); Reno v. Flores, 507 U.S. 292, 301-302 (1993) (infringement of certain fundamental liberty interests must be narrowly tailored to serve a compelling interest).

1. This Court has recognized that infringement of certain fundamental interests that go to the heart of personal privacy and autonomy may be justified only by a showing that the infringement is "narrowly tailored to serve a compelling state interest." Flores, 507 U.S. at 302; Glucksberg, 117 S. Ct. at 2267. Such liberty interests "include[] the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Glucksberg, 117 S. Ct. at 2267 (citations omitted). The liberty interests at stake in this case do not fall within that category, and the Illinois Supreme Court did not suggest that they did.

2. That is not to denigrate the importance of the liberty interests that are at stake in this case. This Court recognized in

Papachristou that the ability to stand on a sidewalk and meet one's friends and neighbors, or to sit on a sidewalk bench with others and watch the passing show, are "unwritten amenities [that] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity." 405 U.S. at 164. In most circumstances, the American people treasure such innocent "amenities," and the government has little occasion or basis to interfere with them.

This Court, however, has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." United States v. Salerno, 481 U.S. 739, 748 (1987). In Salerno, that interest was found sufficient to justify a complete deprivation of liberty -- pretrial detention on the basis of future dangerousness. The record in this case demonstrates that the Chicago City Council had a sufficient basis to justify the far less severe restriction on liberty in the gang loitering ordinance.

a. The Illinois Supreme Court stated that the ordinance was "arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime." Pet. App. 18a. That is incorrect. The ordinance itself defines a crime based on the present threat to public order caused by gang loitering. As the

Preamble to the ordinance recites, the City of Chicago was "experiencing an increasing murder rate as well as an increase in violent and drug related crimes." Pet. App. 60a. The City Council, after holding extensive hearings, determined that "the continuing increase in criminal street gang activity * * * is largely responsible for this unacceptable situation." Ibid. A key part of the problem was that "criminal street gangs establish control over identifiable areas * * * by loitering in those areas" and "intimidat[ing] many law abiding citizens." Ibid. Such loitering "creates a justifiable fear for the safety of persons and property in the area." Ibid. The City Council concluded that "[a]ggresive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear." Id. at 61a.

Those findings were not only supported by the record before the City Council, but are also consistent with data gathered from many other communities. By the early 1990's, 95 % of the nation's largest cities and 88 % of smaller cities in the nation reported gang problems.[9] Most prevalent in areas in which the population is

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[9] Office of Investigative Agency Policies, U.S. Dep't of Justice, Reducing Violent Crime in America: A Five-Year Strategy 4 (1996).

economically disadvantaged, criminal street gangs have attracted a growing number of young people to a life of violence and crime. A component of the Department of Justice has identified more than 23,000 youth gangs in the nation, with more than 650,000 members.[10] In 1994, criminal street gangs accounted for more than 1,000 gang-related homicides in Chicago and Los Angeles alone.[11] Gang intimidation of witnesses makes prosecution of those homicides -- as well as prosecution of the numerous other serious crimes committed by street gang members -- particularly difficult.

b. Faced with that threat to public safety, the City adopted a reasonable and carefully tailored approach. Once criminal street gangs obtained control of the streets in an area, the fear and intimidation they spawned deprived law-abiding citizens of the

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[10] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, 1995 Nat'l Youth Gang Survey: Program Summary 12, 15 (1997).

[11] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, OJJDP Fact Sheet #72 (1997). Chicago has been particularly hard-hit by gang violence. In 1995, Chicago's total of 33,000 gang members was second only to Los Angeles among American cities. 1995 Nat'l Youth Gang Survey 16 (1997). In 1994, there were 240 gang-motivated homicides in Chicago, an all-time high, a five-fold increase from the number in 1987. Ill. Criminal Justice Information Auth., Research Bulletin 4 (Sept. 1996). Between 1987 and 1994, 138 of the 956 gang-related homicide victims were not gang members, including 12 victims age nine or younger. Id. at 10, 13. Of the 956 homicides, 120 were drive-by shootings. Id. at 18.

ability to meet with friends and neighbors in public places and otherwise enjoy this "amenity" of American life. The City's response was to take action so that the "amenity" discussed in Papachristou could be restored to the vast majority of the citizens in the troubled areas. That end, if reached, would lead to the reestablishment of social controls in those areas and a concomitant reduction in fear, gangs, and violent crime. See Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 578-585 (1997) (citing sources).[12]

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[12] It could hardly be argued that the approach adopted by the ordinance is inconsistent with the traditional approach to such problems. In Papachristou itself, the Court noted that vagrancy and loitering statutes had a long history. See 405 U.S. at 161-162. See also Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 595 (1997) (citing authorities for proposition that, prior to Papachristou, "[m]ost states had loitering, drunk and disorderly, and vagrancy statutes, in addition to laws prohibiting breaches of the peace, disorderly conduct, and specific forms of public disorder.") (internal quotation marks omitted). The fact that some of those statutes were unconstitutionally vague under modern standards does not alter the fact that the history and traditions of our people would be inconsistent with the recognition of the right claimed by respondents to loiter at will, regardless of the threat to lawful community life thereby created. See Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) ("Our Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.") (internal quotation marks and citation omitted).

The ordinance's substantial intrusion on the liberty interests of gang members is justified. Under the ordinance, a "[c]riminal street gang" is a group that has "as one of its substantial activities the commission" of one of a series of enumerated serious crimes, such as murder, aggravated battery, intimidation, armed robbery, arson, and drug offenses. Pet. App. 61a-62a. The members of such a gang must "individually or collectively engage in or have engaged in a pattern of criminal gang activity," requiring the commission of at least two offenses. Pet. App. 62a-63a. Criminal organizations of this sort pose a particular threat to the communities in which they operate. The City reasonably believed that denying control of the streets and public areas to gang members was an essential element of attacking that threat. The ordinance intrudes on the liberty interests of those who choose to join criminal street gangs to precisely the extent necessary to address the control of the streets by such gangs. In addition, gang members may remove this disability by discontinuing their membership in the gang.

The ordinance's somewhat lesser intrusion on the liberty interests of those who are not gang members is also justified. Their conduct is implicated only when they loiter with gang members. The City reasonably believed that, once a group of people

loitering in a particular area becomes identified with a particular gang, the group itself poses the threats of intimidation of law-abiding citizens, coercive recruiting practices, inter-gang violence, and the like. Even if it were practical to identify all of the actual gang members in the group and then to require only the gang members to disperse, the City reasonably concluded that that would not solve the problem. In the eyes of onlookers -- including both law-abiding citizens and rival gangs -- the group's identity would persist and the threats to public safety posed by the group would persist. Accordingly, the City reasonably concluded that, where gang members loiter in a group, the group itself had to be dispersed to eliminate the threat. The ordinance is tailored to intrude upon the interests of non-gang members only to the extent necessary to accomplish that goal.[13]

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[13] In addition, the City Council was certainly aware of the threat posed by drive-by shootings and other gang-related violence. See Pet. App. 2a (City Council testimony "revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism."). As a result of that threat, anyone standing with a gang member on a street corner -- especially someone who is unaware that the group contains gang members -- is a potential casualty of stray fire as a result of inter-gang violence. The City has a strong interest in protecting non-gang members from such violence, and the ordinance's requirements that even non-gang members disperse when they are in a group containing gang members assists in achieving that goal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JUNE 1998

COS

cc: Rahm
Mavia.

THE WHITE HOUSE

WASHINGTON

June 18, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Charles F. C. Ruff, Counsel to the President
William Marshall, Associate Counsel to the President

SUBJECT: City of Chicago v. Morales --The Gang Loitering Ordinance Case

INTRODUCTION

The Supreme Court has agreed to hear an appeal by the City of Chicago addressing the constitutionality of a Chicago city ordinance directed at gang loitering. That ordinance allows a police officer who observes a person whom he "reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, [to] order all such persons to disperse." Persons who do not promptly obey such an order are subject to criminal sanctions.

The question before you is whether the Solicitor General should file an amicus curiae brief in support of the City of Chicago. The Attorney General and most of the divisions of the Justice Department oppose filing a brief in this case on policy grounds. The Solicitor General and Office of Policy Development (DOJ) favor submitting a brief. DPC and Rahm strongly support filing a brief.

BACKGROUND

Although the constitutional issues raised by the Ordinance are not free from doubt, the Solicitor General is confident, and we agree, that strong arguments can be raised in its defense. There is also no dispute that the United States has an interest in measures that attempt to control gang violence and that a brief from the Solicitor General would therefore be warranted.

Rather, the debate over whether to submit a brief concerns whether the Administration should support the particular approach to gang activity taken by the City of Chicago in this case. The City of Chicago believes that the Ordinance has had a significant effect on gang violence

and that it gives the police an important tool in curbing the type of gang activity that is particularly menacing to communities and their citizens.

The Attorney General, on the other hand, believes that support for Chicago's policy is ill-advised and has asked us to convey her views to you. First, she is concerned that the Ordinance unduly interferes with individual freedom. Loitering, she argues, is perfectly legal activity and the Ordinance empowers the police to order even non-gang members to disperse. Second, the Attorney General contends that the Ordinance is at odds with our commitment to community policing. The use of dispersal orders, she argues, will create resentment towards the police rather than foster the type of positive relationship that is engendered by the community policing programs we have supported. Third, she contends that Chicago's approach is not as effective as the approach taken in other cities such as Boston and that we should limit our support to the programs we believe are the most effective -- particularly when those programs are also less intrusive on civil liberties.

RECOMMENDATION

The Chicago case is likely to generate a landmark decision no matter which direction the Court rules. We therefore begin with premise that the United States has an important interest in being heard before the Supreme Court on this matter.

We also believe that supporting the City of Chicago in this case would be consistent with the priority that the Administration has placed on efforts to fight gang related violence. We also believe it is consistent with our commitment to community policing because it can serve as an effective complement to those measures. We do not suggest that the approach taken by Chicago in this Ordinance is likely to prove to be a cure-all for the problems of street gangs and gang violence and we agree with the Attorney General that other cities can learn much from the particular approach taken by Boston. We believe, however, that differing communities should be able to tailor gang-control measures to their own experience and that Chicago's approach, if taken in conjunction with other law enforcement measures, could prove to have considerable value. We therefore recommend that the Solicitor General file an amicus curiae brief in this case.

____ Approve ___Disapprove